IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. A-290

**77-5787**

JAMES KENNETH WEIND, Petitioner

v.

STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

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The Petitioner, James K. Weind, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Supreme Court entered in this proceeding on June 22, 1977.

## OPINION BELOW

The opinion rendered by the Ohio Supreme Court is officially reported at 50 Ohio St. 2d 224 (1977). The opinion of the Franklin County Court of Appeals was not officially reported, but does appear in the Court's publication of 1976 Decisions at page 2555. Copies of both opinions are included in the appendix.

## JURISDICTION

The judgment of the Ohio Supreme Court was delivered and entered on June 22, 1977. On September 27, 1977, Mr. Justice Stewart entered an order extending the time for filing of this petition until and including November 25, 1977. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3).

## QUESTIONS PRESENTED

1. Whether Ohio's statutory procedure for imposing the death penalty, particularly as it was applied to Petitioner, violates the Eighth and Fourteenth Amendments to the United States Constitution.

2. Whether Petitioner was denied his Fifth, Sixth, and Fourteenth Amendment rights to the effective assistance of counsel, a fair trial, and due process of law when the Trial Court overruled Petitioner's pre-trial motion for a continuance.

3. Whether Petitioner was denied his Fifth, Sixth, and Fourteenth Amendment rights to a fair trial and due process of law when the Trial Court failed to instruct the jury to disregard all testimony concerning an alleged tape recording of a conversation between the two key State witnesses after the Court had allowed considerable hearsay testimony concerning the tape but later ruled it inadmissible as evidence.

## CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OF PROCEDURE INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Ohio law:

Ohio Revised Code Section 2903.01.

> Aggravated murder.
> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code. (Page's Ohio Revised Code, p. 15).

Ohio Revised Code Section 2929.02.

> Penalties for murder.
> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.
> (B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.
> (C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death. (Page's Ohio Revised Code, p. 152).

Ohio Revised Code Section 2929.03.

Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the state, if any, offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender. (Page's Ohio Revised Code, p. 153).

Ohio Revised Code Section 2929.04.

> Criteria for imposing death or imprisonment for a capital offense.
>
> (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:
>
> (1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
>
> (2) The offense was committed for hire.
>
> (3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
>
> (4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.
>
> (5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
>
> (6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.
>
> (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.
>
> (B) Regardless of whether one or more of the aggravated circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderence (preponderance) of the evidence:
>
> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity. (Page's Ohio Revised Code, p. 154).

Ohio Rules of Criminal Procedure, Rule 11(C)(4).

> (4) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.
>
> If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

> If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.
>
> If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

## STATEMENT OF THE CASE

On the morning of December 15, 1974, the body of Hermalee Ross was found in an abandoned schoolhouse in Delaware County, Ohio. Evidence produced at trial indicated that a conspiracy existed among a group of persons to murder the victim. The Petitioner, James K. Weind, was indicted on December 23, 1974, for kidnapping, aggravated murder with death penalty specifications, and aggravated murder while committing kidnapping with death penalty specifications.

Defense counsel was appointed on January 7, 1975. Defense counsel filed a request for discovery on January 7, 1975, pursuant to Criminal Rule 14, Ohio Rules of Criminal Procedure. The case was set for trial on February 18, 1975. After waiting the appropriate number of days, defense counsel on January 28, 1975, filed a motion with the Trial Court, as discovery had still not been provided. Along with the motion for discovery, counsel requested a continuance, alleging that the failure to provide discovery had "seriously hampered the ability of counsel to adequately counsel and represent the Defendant." Counsel's memorandum in support of his motion included the following language:

> ... It is felt that such efforts are presently insufficient to guarantee to the defendant his right of effective assistance of counsel.
>
> ... Counsel for the defendant has spoken to Mr. James O'Grady, Chief Trial Counsel for the Prosecuting Attorney, and was informed that Mr. O'Grady had no objections to a continuance of trial of this defendant until completion of the trials of other parties allegedly involved in the instant offense.
>
> ... Counsel for the defendant further asserts that additional time is necessary for the completion of research of legal issues presented by the present case, and, necessarily research will be affected by the nature of the material as yet to be received from the Prosecuting Attorney.

When the requested discovery was finally provided on February 4, 1975, it left defense counsel a mere fourteen days in which to interview nearly sixty witnesses and to otherwise prepare for trial. Faced with this unworkable situation, defense counsel, on February 5, 1975, filed a supplemental memorandum with the Court in which he argued the necessity for a continuance. Counsel's memorandum concluded:

> Insufficient time remains available to counsel to render effective assistance to their client at a trial scheduled to commence February 18, 1975.

The Trial Court did not grant a continuance. As a result, counsel was unable to interview some witnesses, including Robert Boswell and Michael Goins, key witnesses for the State, prior to trial. Boswell was an important witness for the State of Ohio at trial, yet defense counsel was unable to determine his address or whereabouts before trial began. Petitioner objected to Boswell's testimony at trial on the grounds that he was not provided with proper discovery, i.e., a new address for Boswell which the prosecution had 10 days before trial, but never provided to defense counsel, but was overruled. (Tr. 231). Petitioner also objected to the testimony of Stephen Molnar, Jr., Chief Firearms Examiner for the Ohio State Bureau of Criminal Investigation, concerning firearms comparison tests conducted just two days before the trial began because he was not provided with the results thereof prior to trial. (Tr. 156). This objection was also overruled.

In the Ohio Supreme Court, Petitioner argued that the Trial Court's denial of his request for a continuance constituted an abuse of discretion by the Trial Court, and denied him the guarantee of counsel provided by the Fourteenth Amendment to the United States Constitution. In overruling Petitioner's contention the Ohio Supreme Court held:

> In reviewing the record, this court finds that the defense ably tried the case. Since no prejudice appears to have been caused by the failure to grant a continuance, appellant's eighth proposition of law is without merit. State v. Weind, 50 Ohio St. 2d at 234 (1977).

The totality of the State's evidence showed that the victim was abducted from the parking lot of a food store in the early morning hours of December 15, by at least two persons, that she was taken to a rural area in an adjacent county, and that she was shot to death in an abandoned schoolhouse.

The major evidence against Petitioner was supplied by Robert Boswell who lived in the same apartment building as Petitioner. (Tr. 242, 243). Boswell testified that on the day of the crime, Petitioner came to his apartment and gave him a box containing a weapon. (Tr. 244, 246). Petitioner returned to the apartment later in the day and allegedly told Boswell that he and one Carl Osborne abducted the victim, took her to the country, and that Osborne then murdered her. (Tr. 251). Two other witnesses, Debbie Zweydorff and Kay Osborne testified that Petitioner was in the company of Carl Osborne on the evening of December 14, and the early morning hours of the next day. (Tr. 380, 383).

Police recovered what was believed to be the murder weapon from Alum Creek, the place where Petitioner allegedly told Boswell they had hidden it. (Tr. 190, 257).

The prosecution repeatedly attempted to introduce a tape recording, made by Detective Ron Price, of a conversation between Boswell and Michael Goins which allegedly included evidence against Petitioner. (Tr. 222, 223, 229, 230, 239, 264, 269). Defense counsel repeatedly objected to any testimony concerning the existence or contents of the tape. (Tr. 216, 220, 222). Over objection, the Court allowed repeated reference to the tape by witnesses Price and Boswell, allowed parts to be played before the jury, and allowed some testimony concerning the substance of the tape. After considerable testimony concerning the tape, it was ruled inadmissible by the Trial Court on the grounds that it was extremely inflammatory. (Tr. 329). Other than the statements of Boswell and Goins, the State offered no other evidence concerning Petitioner's participation in the commission of the murder.

Counsel for Defendant did not request the Trial Court to instruct the jury to disregard the testimony concerning the tape. In the Ohio Supreme Court, Petitioner assigned as error the Trial Court's failure to instruct the jury to disregard all testimony regarding either the existence of or contents of the tape recording after it sustained the defense's objections to the admissibility of the tape. The Ohio Supreme Court ruled that:

> In the instant cause, failure of the trial judge to give the jury specific instructions regarding the tapes did not constitute an error that affected the defendant's 'substantial rights' under Crim. R. 52(B), since mention of the tapes by the judge would have called the jury's attention to them to the prejudice of the defendant.

> Since appellant failed to timely object to the jury instructions, and since plain error was not involved, appellant's twelfth proposition of law is rejected. State v. Weind, supra, at 237.

The Petitioner, having filed a timely Notice of Alibi, presented a number of witnesses whose testimony suggested that he was not involved in the offense. (Tr. 437, 440, 450, 461). Petitioner was found guilty of all counts.

Subsequent to trial a mitigation hearing was held for the purpose of determining whether one of Ohio's three statutory mitigating circumstances was present. Dr. Jack Morganstern, a psychiatrist, testified that he had examined Petitioner and concluded that it was unlikely that the offense would have been committed but for the fact Petitioner was under duress, coercion, or strong provocation since such behavior would be atypical given Petitioner's stable family structure, close family contact, and non-violent background. (Tr. 3, 4, 5, 6). Dr. Jaime Smith e Incas, a psychiatrist, testified that Petitioner was suffering from a psychosis at the time of the offense. (Tr. 10).

A second mitigation hearing was held three months later, at which time Dr. Smith e Incas testified that he could not testify to a reasonable medical certainty that Petitioner was psychotic at the time of the offense because he felt it was impossible to extrapolate in that fashion from the information which he possessed. (Tr. 55, 56). At the conclusion of the mitigation hearing defense counsel argued that Petitioner was suffering from a psychosis at the time of the offense. (Tr. 61).

The Court found that no statutory mitigating circumstances had been established by a preponderance and sentenced the petitioner to death. (Tr. 62, 63).

In the Ohio Supreme Court, Petitioner argued that the Trial Court clearly abused its discretion in holding that mitigating circumstances were not shown by a preponderance of the evidence during the mitigation hearing. Affirming the findings of the Trial Court, the Supreme Court held:

> In this cause, the only evidence to support the theory that the defendant suffered a psychosis at the time of the offense was Dr. Smith e Incas' opinion that since the defendant had a non-violent behavior background, he possibly could have suffered an acute but short-lived psychotic break. The possibility of a condition is not enough to support a finding of the existence of a mitigating circumstance. Having reviewed the psychiatric reports and the evidence adduced at the mitigation hearing, this court finds no abuse of discretion of the trial court in finding that the offense was not primarily the product of Weind's psychosis or mental deficiency.

> Appellant's sixth proposition of law is overruled. State v. Weind, supra at 232, 233.

And,

> Although this evidence suggests that the defendant may have acted under a strong domination or persuasion, it is outweighed by other evidence, such as his relationship to his co-conspirators, his motive committing the crime, and his participation in the planning and cover-up of the crime, which suggests that his acts were voluntary.
>
> The court affirms the trial court's determination that the defendant was not under duress, coercion, or strong provocation. State v. Weind, supra at 231.

In the Ohio Supreme Court, Petitioner's proposition of law that the Ohio death penalty statutes place unconstitutional limitations upon the consideration of mitigating circumstances was summarily overruled. State v. Weind, supra at 225.

Petitioner's proposition of law that the Ohio death penalty statutes are unconstitutional in that they deny the capitally accused the right to a judgment of his peers as to the existence of mitigating circumstances, and the appropriateness of the penalty of death was overruled by the Ohio Supreme Court. State v. Weind, supra at 226.

Petitioner's argument in the Ohio Supreme Court that the statutory sentencing procedure following a conviction for a capital offense is unconstitutional and denies the accused due process and equal protection of the law because the burden is placed upon the accused to establish a reason why he should not be put to death was not answered by the Court since it found that the Trial Court did not place such burden on Petitioner. State v. Weind, supra at 226.

The Ohio Supreme Court also overruled Petitioner's contention that the statutory sentencing procedure following a conviction for a capital offense is unconstitutional and denies the defendant equal protection and due process of law because the defendant who pleads not guilty to a capital offense and is found guilty, is treated differently than the defendant who pleads guilty or no contest to the same offense and whose plea is accepted. State v. Weind, supra at 228, 229.

Finally, the Ohio Supreme Court summarily rejected Petitioner's proposition of law that the statutory sentencing procedure following a conviction for a capital offense is unconstitutional and denies a defendant equal protection and due process of law because it places a greater risk of death on a defendant who asserts his right to a trial by jury. State v. Weind, supra at 229.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONAL VALIDITY OF PETITIONER'S DEATH SENTENCE.

#### A. The Ohio Death Penalty Statutes, as Written, Construed, and as Applied to Petitioner, Unconstitutionally Limit the Proper Consideration of All Relevant Mitigating Circumstances.

It has been recognized that "(i)ndividual culpability is not always measured by the category of the crime committed." Furman v. Georgia, 408 U.S. 238 (1972) at 402 (Burger, C.J., dissenting). This principle was butressed by the decisions of this Court in Roberts v. Louisiana, U.S. 49 L. Ed. 2d 974 (1976) and Woodson v. North Carolina, U.S. 49 L. Ed. 2d 944, which indicated that mandatory death penalty statutes did not allow for sufficient consideration of a defendant or his crime to comport with the basic principles of Furman v. Georgia, 408 U.S. 238 (1972). Petitioner contends that the Ohio statutes, Ohio Revised Code Sections 2929.02-.04, are both improperly restrictive and patently unclear, thus rendering them unconstitutional. Moreover, Petitioner alleges that he was directly affected by the unconstitutionality of the statutes, and was therefore sentenced to death in contravention of the Eighth and Fourteenth Amendments.

In particular, Petitioner argues that the State of Ohio has adopted and applied a framework for the finding of mitigating factors which will preclude the application of the death sentence in a manner which disregards the mandate of this Court. Section 2929.04(B), Ohio Revised Code states that the death penalty will be precluded when one of the following is proved by a preponderance of the evidence:

> (B)(1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Two of these mitigating factors were involved in the instant case, counsel for Petitioner having argued at the mitigation hearing both that Petitioner was suffering from psychosis and that he acted under duress, coercion, or provocation. Further, Petitioner alleges that the Trial Court unconstitutionally

failed to consider such relevant factors as age, character, and background, including Petitioner's lack of a prior criminal record.

Petitioner's mitigation hearing began on April 14, 1975. The first witness, Dr. Morganstern testified that it was unlikely that the offense would have been committed were it not for the fact that Petitioner was under duress, provocation, or coercion. (Tr. 4, 9). He further testified:

> Well, the question as I understood it, Mr. Romanoff, was that assuming that the act took place and Mr. Weind did it, would it be likely that he without special duress, strong provocation, or some very special circumstances would have committed that and I said, no, it would be unlikely for the . . Mr. Weind normally to do that. (Tr. 9).

In short, Dr. Morganstern testified that he had determined that the mitigating circumstances described in O.R.C. Section 2929.04(B)(2) was in evidence on the facts of the instant case.

The second psychiatrist to testify, Dr. Smith e Incas, testified that in his opinion the offense would not have been committed but for the fact of Petitioner's psychosis. (Tr. 18). Two months later, Dr. Smith e Incas was recalled and repeated his testimony that Petitioner was suffering from temporary psychosis at the time of the offense. After being pressed by the prosecution as to the degree of medical certainty of his opinion, the following transpired upon examination by defense counsel:

Q. In other words, you weren't there. You can't really say what happened with any <u>certainty</u>. Is that correct?

A. Exactly. I can only piece together the behavioral pattern and take into consideration one's prior pattern of behavior, the circumstances of what occurred.

Q. O.K. And I sense on your part, Dr.. if someone asks you to extrapolate to a point in time when you weren't present. Is that correct?

A. Yes.

Q. O.K. That's a normal medical hesitancy?

A. Normal, it's just judicious and honest approach to the situation.

Q. All right. Are you saying then that it would basically be impossible for any Doctor to extrapolate that behavior from what has been provided?

A. I think so.

(Tr. 55, 56).

Thus, the defense presented two psychiatrists, each of whom testified to the existence of a separate mitigating circumstance recognized by the Ohio statute. Though Dr. Smith e Incas refused to declare that he was certain that Petitioner was psychotic at the time of the offense, he did testify that he arrived at the strongest conclusion possible where a doctor has not had the opportunity to examine Petitioner prior to or at the precise time of the offense. Thus, Petitioner maintains that the defense offered substantial proof of the existence of two mitigating circumstances. Because the Trial Court refused to find the existence of either mitigating circumstance, and because this judgment was affirmed by the Court of Appeals and Ohio Supreme Court, it must be concluded that the Ohio statute was applied in such a way as to deprive Petitioner of his Eighth and Fourteenth Amendments rights.

Prior decisions by the Ohio Supreme Court interpreting its death penalty statute have made it abundantly clear that the statutes have been interpreted so as to render them unconstitutional due to a strict narrowing of the mitigating factors. For example, under O.R.C. Section 2929.04(B)(3), the death penalty is precluded if:

> (t)he offense was primarily the product of the offender's psychosis or mental deficiency though such condition is insufficient to establish the defense of insanity.

Nowhere in the Code is "mental deficiency" defined. However, in the initial case decided by the Ohio Supreme Court under the Ohio statute, it was held that the term meant only a "low or defective state of intelligency." State v. Bayless, 48 Ohio St. 2d 73 (1976) at 96. Thus, no consideration of any other of a broad range of mental problems was possible. Perhaps realizing that this narrow interpretation of "mental deficiency" rendered that statute constitutionally suspect, the Court, at the next opportunity, expanded the definition to:

> allow... the broadest possible latitude in the examination of the defendant's mental state and mental capacity for purpose of the mitigation inquiry, excepting only legal insanity. (Emphasis added.) State v. Black, 48 Ohio St. 2d 262 (1976) at 268.

The Court noted that a restrictive interpretation of the term serves only to "bind the conscience of the Trial Court" to the defendant's detriment, and that "any mental state or incapacity may be considered." State v. Black, supra at 268.

Although the more expansive definition as promulgated in Black seems desirable, it is abundantly clear that the Black definition was totally ignored by the Ohio Court in subsequent cases. In State v. Bell, 48 Ohio St. 2d 270 (1976), decided the same day as Black, the Court affirmed the sentence of an appellate who was 16 years of age, involved with drugs, a slow learner, and with poor family and education lives; and despite an assertion (apparently cosmetic) that age was to be a "primary factor" in determining mental deficiency. State v. Bell, supra, at 282 which statement directly contradicted an earlier observation that age had no bearing on any mitigating factor. State v. Bayless, supra, at 87n.

The Court next declined to apply its more liberal Black definition of "mental deficiency" in State v. Harris, 48 Ohio St. 2d 351 (1976), where a 17 year old sociopath was summarily held to be well within the bounds of mental sufficiency; in State v. Royster, 48 Ohio St. 2d 381 (1976), where a low intelligence appellant had his death sentence affirmed despite a contention of mental deficiency; and in State v. Lockett, 49 Ohio St. 2d 48 (1976) where another drug involved appellant with a low I.Q. had her contention of mental deficiency dismissed, and death was imposed on the defendant who was in a car two blocks away at the time of the shooting. In fact, not a single death sentence has been set aside by the Ohio Supreme Court for this or any other reason. These cases, as well as the instant case, demonstrate that the expanded definition of "mental deficiency" in Black, supra, is a mere platitude. Petitioner was placed in an uncertain position: he could not adequately prepare to meet the burden of proof placed upon him by O.R.C. Section 2929.04 to show the existence of a mitigating circumstance since he could not know precisely what he must show. A statute must, in order to comport with due process, be sufficiently definite that it is subject to ready and certain application. Ashton v. Kentucky, 384 U.S. 195 (1966). Petitioner appeared and presented a convincing demonstration at the mitigation hearing that he was suffering at the time of the offense from psychosis short of that required to prove legal insanity. The manner in which this section of the statute has been construed in this and other cases demonstrates that this mitigating factor is largely illusory in practical effect.

An even more persuasive showing was made at the mitigation hearing that the offense would not have been committed but for duress, coercion, or provoca-

cation, which is the mitigating circumstance codified in O.R.C. Section 2929.04 (B)(2). Yet the Ohio Supreme Court has failed to find this circumstance in any case. In State v. Woods, 48 Ohio St. 2d 127 (1976), the Court refused to find coercion despite psychiatric evidence that defendant was "easily dominated and controlled." In the instant case, the psychiatric testimony was similarly direct. Dr. Morganstern testified that in his opinion it was unlikely that the offense would have been committed but for the fact of duress and provocation, since such behavior would be atypical given Weind's stable family structure, close family contact, and non violent background. Other evidence produced at trial revealed a complex plot whereby Petitioner and another were directed to perform the murder. It was established that Petitioner was easily led and highly susceptible to influence and domination. The failure to find mitigation on these facts is persuasive of the argument that the Ohio Supreme Court has unconstitutionally narrowed the mitigating circumstance of coercion, domination, or provocation. Yet the Ohio Supreme Court failed to find this factor in an equally alarming situation, in State v. Woods, 48 Ohio St. 2d 127 (1976). There, despite the uncontroverted expert testimony showing Woods to be easily "dominated and controlled", and that he would not have committed the crime but for the co-defendant's domination, 48 Ohio St. 2d at 134; the fact that Woods' accomplice was a career criminal, older, and the instigating force in the crime; and reluctance of Woods to complete the crime, the Court affirmed Woods' sentence, thus demonstrating its own reluctance to find mitigating factors when they do exist. Granted that in applying this mitigating factor the proverbial line must be drawn somewhere short of the existence of an actual defense to the crime, Woods seems to leave no space for such a line to be drawn. In effect, then, Section 2929.04 lists a wholly illusory factor, "mitigating" in title only of little or no practical value.

Next, Petitioner argues that the Ohio death penalty statute is unconstitutional as applied to him for the reason that the Ohio Supreme Court allowed the Trial Court to find no mitigation in a haphazard manner without adequate care for Petitioner's rights. Petitioner argues that the Trial Court abused its discretion in failing to order further psychiatric examination of him for the purposes of the mitigation inquiry.

Assuming arguendo that the mitigation hearing failed to clearly demonstrate that one of the mitigating circumstances was present, there is no doubt

that there was at least considerable doubt on the question. This was acknowledged by the Ohio Supreme Court, when it announced:

> The possibility of a condition is not enough to support a finding of the existence of a mitigating circumstance. Weind, supra, p. 233.

Inasmuch as there was at least considerable doubt as to whether Petitioner was psychotic at the time of the offense, the Court should have granted Petitioner's motion for re-examination. The failure to grant the motion evidences a lack of concern for Petitioner's rights and a careless, haphazard application of the statute. This approach flies in the face of prevailing law announced by this Court as to the importance of a careful, closely scrutinized inquiry into the question of mitigation.

Finally, Petitioner argues that the Ohio system for finding mitigating circumstances is wholly inadequate for the reason that it precludes any effective inquiry into such necessary factors as the age, character, background, and prior record of the defendant, as mandated by Woodson, supra, at p. 961.

The Ohio Supreme Court has pointed out that Ohio's statute does not provide for consideration of the defendant's age, prior criminal record, a broad range of mental impairments, and defendant's actual conduct which may involve him substantively only through principles of complicity. State v. Bayless, supra, at 87n. These deficiencies in the scheme fall directly within the ambit of the quoted language from Woodson in the previous paragraph.

As discussed earlier, the Ohio Supreme Court attempted to salvage the statute in State v. Bell, supra, by holding that age is a factor; but even ignoring the obvious contradictions on this issue between Bell and Bayless, it is clear that age can be a factor only as it pertains to determining mental deficiency. (And as also previously discussed, mental deficiency is an extremely shadowy concept.)

The Ohio provision also fails in light of the requirements of Woodson, quoted supra, in that it makes no allowances for a defendant's character or prior record. Although it is pointed out in State v. Bell, supra, at 281, that the preamble to the list of mitigating circumstances that those circumstances are to be considered in light of "the history, character, and condition of the offender," if examined in conjunction with the mitigating factors, such an instruction at best is superflous and at worst is an attempt to camoflage the true lack

of breadth of the statute. How can one consider a defendant's character and record as it relates to the inducement or facilitation of the offense by a victim? Or as it relates to whether the offense was a product of mental deficiency? The defendant's character, record, etc., are exclusive factors, not modifying ones; they must be, if used, considered as separate elements, not as parts of others. The very structure of Section 2929.04(B) logically preclude such use.

Consequently it becomes apparent that the list of mitigating circumstances in subsection (B)(1), (B)(2), and (B)(3) are the only ones which realistically may be considered under the statute.

Petitioner here argues that this argument applies with special force to the facts of the instant case. Clearly, were such factors to be made part of the mitigation decision in Ohio, Petitioner would not be a likely prospect for the death penalty. The language of the Ohio Supreme Court in affirming his conviction and death sentence demonstrates this conclusion. The Court, while maintaining that Petitioner's proof fell short of establishing a statutory mitigating circumstance, acknowledged that the available evidence showed that Petitioner's character and background were highly inconsistent with the offense. The Court acknowledged that:

> It was the doctor's conclusion that it would have been unlikely for Weind to have committed the offense without '*** special duress, strong provocation, or some very special circumstances,' since such behavior would be atypical given Weind's stable family structure, close family contact, and non-violent background. (p. 230).

Later, the Court observed:

> ... The doctors agreed that the defendant's involvement in the crime was highly unusual... he was easily led because he felt a need to belong and that he was non-violent in nature. (p. 231).

Despite the Court's findings that Petitioner's behavior was atypical, unusual, and inconsistent with his character and background, the Court was forced to affirm the death sentence simply because it felt no statutory mitigating factor had been proven.

The scope of Ohio's mitigating factors is so limited that Ohio has, in practical effect, mandatory death penalties for seven types of aggravated murder. The provisions of Section 2929.04(B) can be applied so seldom that the

Ohio provision is quite similar to the Louisiana statute nullified in Roberts v. Louisiana, supra. That statute provided for a mandatory death penalty for defendants convicted of five categories of homicide. Lou. St. Ann. - R.S. 14:30(1) through (5). The Ohio framework likewise resembles the North Carolina statute (North Car. Gen. Stats. Section 14-17) struck down in Woodson v. North Carolina, supra, in that death penalties for certain acts are automatic notwithstanding the existence of mitigating factors in the crime. Indeed, Ohio's Tenth District Court of Appeals, in affirming a defendant's death sentence, characterized the Ohio scheme as a mandatory death penalty:

> Judge Strausbaugh, in the opinion of... (State v. Harris, No. 75AP-195 (1975 Decisions, page 2075) ... succinctly wrote: 'Accordingly, the new Ohio law provides for a mandatory death penalty in certain cases of murder dependent upon the factual determinations made. The death penalty, being mandatory, rather than discretionary, is not precluded by Furman.' State v. Hancock, 75AP-151 (1975 Decisions, p. 2273).

In light of the numerous constitutional objections to the Ohio death penalty statutes, and because of Petitioner's particularized demonstration of prejudice resulting from the manner in which the statutes are written and interpreted, he urges this Court to grant certiorari.

B. The Ohio Death Penalty Statutes Denied Petitioner his Right to a Judgment of his Peers in Determining the Existence of Mitigating Circumstances in Violation of the Sixth, Eighth, and Fourteenth Amendments.

> In our criminal courts the jury sits as the representative of the community; it's voice is that of the society against which the crime was committed. Williams v. New York, 337 U.S. 241 (1949) at 253 (Murphy, J., dissenting).

Ohio Revised Code Section 2929.03(C) precludes jury participation in the sentencing process: the function of the jury terminates with a determination of guilt or innocence of the offense and the aggravating specifications. Thus, the voice of the aggrieved society is omitted in sentencing contrary to historic precedent as set forth in McGautha v. California, 402 U.S. 183 (1971) at 200.

Further, the existence or absence of mitigating factors is, beyond any argument, a question of fact, on which a defendant has a Sixth Amendment right to jury determination. U.S. v. Kramer, 289 F. 2d 909 (C.A. 1961); U.S. v.

DeVall, 462 F. 2d 137 (C.A. 5 1972). The jury is called upon to determine the factual issues relating to the existence of aggravation; fundamental fairness would seem to require that that same body make the factual determinations relating to mitigation as well.

C. Ohio's Capital Sentencing Procedures Unconstitutionally Shift to Defendants the Burden of Proving the Existence of Mitigating Factors by a Preponderence of the Evidence.

This Court held in Mullaney v. Wilbur, 421 U.S. 684 (1975), that, to satisfy due process requirements, the State must bear the burden of proving every element of a crime. Ohio Revised Code Section 2929.04 places the burden on a defendant to save his life by affirmatively proving mitigation. This:

> fails to recognize that the criminal law... is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Mullaney v. Wilbur, supra, at 698-699.

This degree of culpability is precisely what should be of primary importance in a mitigation inquiry. Ohio draws distinctions between aggravated murders where the defendant is convicted of the substantive offense and no mitigating factors are found; and those where the defendant is convicted of the substantive offense and mitigation is found to exist. The death penalty is imposed only in the former situation; only in this situation, however, is the State relieved of its burden to prove its case beyond a reasonable doubt. Petitioner contends that this arrangement unconstitutionally shifts the burden of proof in violation of Mullaney v. Wilbur, supra, and In Re Winship, 397 U.S. 358 (1970). Indeed, if the State seeks to take someone's life it should unquestionably bear the burden of demonstrating the necessity and legitimacy for doing so.

Petitioner raised this argument at his mitigation hearing when counsel inquired into whether he had the burden of proving a mitigating factor. The Ohio Supreme Court responded to Petitioner's contention in the following manner:

> The Court does not reach this issue since the record reveals that such burden was not placed on the accused. In fact, the trial judge, in response to a question by the defense concerning who had the burden of proof at the mitigation hearing, stated that 'Inasmuch as there is no burden, I will suggest that the State go first.' State v. Weind, 50 Ohio St. 2d, 226-7.

Petitioner contends that the Supreme Court's assertion of there being no burden of proof on either side is inconsistent with its affirmation of the

finding of no mitigating circumstance. In light of the persuasive evidence adduced at the mitigation hearing by the two psychiatrist quoted above, the Court must necessarily have placed a heavy burden upon Petitioner in order to arrive at a finding that no mitigation was present. In fact, to hold that there is no burden necessarily places the burden upon defendant since it is his life that is at stake. At any rate, the Ohio Supreme Court's holdings in this and other capital cases make clear that much is demanded from the defendant in terms of proof. As the Court applied an unconstitutional burden of proof, his sentence of death must be reversed.

D. Ohio Capital Sentencing Procedures Unconstitutionally Penalize the Capitally Accused Who Exercise their Rights to a Jury Trial.

Under Ohio law, if a defendant pleads not guilty to an indictment charging aggravated murder with a specification of aggravating circumstances, "(t)he trier of fact may be either a jury or, if waived, a three-judge panel; ... If the defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge (in a jury-tried case) or the three-judge panel (in a jury-waived case) to determine whether mitigating circumstances exist which preclude imposition of the death penalty... The death penalty is to be imposed if the trial judge or the three-judge panel unanimously finds that none of the three possible mitigating factors has been established to exist by a preponderance of the evidence." State v. Bayless, supra, 48 Ohio St. 2d at 81-83. Petitioner further points out that the only outlet from the death penalty for a capital defendant convicted of aggravated murder upon a plea of not guilty is either (1) a failure of the jury (or three-judge panel) to find factually the existence of a statutory aggravating circumstance, or (2) the finding by the Court (or three-judge panel) of one or more of Ohio's three extremely narrow mitigating circumstances. If any aggravating circumstances and no mitigating circumstances is found, the death penalty must be imposed. Ohio Revised Code Ann. Section 2929.03(C),(E) (Page 1975).

On the other hand, if Petitioner pleads guilty, the Court would have "an alternative." It would not be restricted by Ohio's rigid aggravated-mitigating circumstances scheme, but could impose a life sentence for any reason that it thought fitting, "in the interest of justice." Ohio Rule Crim. Pro. 11(C)(4) provides in relevant part:

> If the indictment contains one or more specifications, and a plea of guilty or no contest to the

> charge is accepted, the court may dismiss the specifications (of aggravating circumstances) and impose sentence (of life imprisonment) accordingly.

Moreover, had Petitioner elected to waive trial by jury of the issue of guilt or innocence, he could have been sentenced to death only if a "panel of three judges unanimously (found)... that none of the (statutory) mitigating circumstances... is established by a preponderance of the evicence." Ohio Revised Code Ann. Section 2929.03(E) (Page 1975). The benefit of trial of the mitigating-circumstances issue by a multi-judge panel which cannot impose a death sentence in the absence of unanimity is obviously considerable:

> A multi-judge court offers an opportunity for disagreement wholly lacking in a single judge. With such an issue as the death penalty involved, the possibility and availability of disagreement are advantages that cannot be disregarded. The fact that a single judge may be reluctant to assume the awesome solitary choice between life and death cannot weight in the balance. Judges are presumed to have the fortitude to carry out their responsibilities.

Rainsburger v. Fogliane, 380 F. 2d 783, 785 (C. A. 9 1967).

In United States v. Jackson, 390 U.S. 570 (1968), this Court held that the rights to plead not guilty and to have a jury trial are unconstitutionally diminished when separate and more lenient sentencing standards are established for cases in which these rights are waived. See also Funicello v. New Jersey, 403 U.S. 948 (1971) (per curiam); Atkinson v. North Carolina, 403 U.S. 948 (1971) (per curiam). Such a scheme "needlessly encourages" the waiver of the rights to have one's guilt determined by a trial and by a jury. United States v. Jackson, supra, 390 U.S. at 583. Ohio's statutes and rules of Court governing the trial of capital cases provide a similarly needless and effective encouragement of waiver of federal Fifth and Sixth Amendment rights; and their constitutionality under Jackson therefore plainly warrants review on certiorari.

E. The Unlimited Opportunities for the Injection of, and Excessive Use of Discretion by the Prosecuting Attorney Renders the Ohio Statute Violative of the Principles of Furman v. Georgia, 408 U.S. 238 (1972).

The twelve States, including Ohio, which re-enacted capital punishment laws after Furman v. Georgia, supra, based on the aggravating/mitigating factor's scheme of Model Penal Code Section 201.6 (Proposed Offical Draft, 1962) obviously did so to avoid the problems presented by allowance of unbridled discretion in the sentencing authority and condemned in Furman. Notwithstanding the substantive merits of the statutes, however, the discretion vested in, and exercised by, the

office of the prosecutor remains unchecked. As but one example of the actual exercise of such discretion, see Appendix E setting forth facts which show discretion in one of its most dangerous forms: after an appellate reversal of his capital murder conviction, a brother was offered a dismissal of a death sentence of his sister, already affirmed by the Ohio Supreme Court, in return for his guilty plea to non-capital murder.

The points at which prosecutorial discretion can be manifested in the capital offense criminal process are limitless: the example cited here represents only one such possibility. The injection of such discretion into the process of deciding who may live and who must die is more than Eighth and Fourteenth Amendments can tolerate.

F. The Death Penalty in Ohio is in Fact Imposed Without Adequate Safeguards Designed to Insure that Like Sentences are Imposed in Like Cases.

Plenary review of death sentences by a State's highest Court -- the only Court with statewide jurisdiction -- is an important procedural safeguard against the arbitrary and capricious imposition of the death penalty, Gregg v. Georgia, U.S. 49 L.Ed. 2d at 829, 839, for it helps to insure not only that the death penalty is appropriate when measured by the facts of a particular case, but that it is proportionate to sentences imposed in similar cases. Although death sentence cases are reviewable as a matter of right in Ohio's Appellate Courts, including the Ohio Supreme Court, it was generally believed in the pre-Furman era that no Ohio reviewing Court had the authority to set aside a death sentence as excessive or inappropriate. See McGautha v. California, and Crampton v. Ohio, 402 U.S. 183, 195, n. 7 (1971). However, in State v. Bayless, supra, at 86, the Ohio Supreme Court stated that it would "independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." That the Court has not kept its promise with fidelity to Eighth Amendment values is strongly suggested by a brief review of the Ohio cases.

In State v. Edwards, 49 Ohio St. 2d at 47, the Court, citing a pre-Furman capital case, State v. Cliff, 19 Ohio St. 2d 31, 249 N.E. 2d 823 (1969), explicitly stated that:

> In criminal appeals this court will not retry issues of fact (relating to mitigation). In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered.

The "substantial evidence" test in Ohio, however, as State v. Cliff, supra, makes clear, is an inordinately narrow test, for the verdict of sentence will be sustained under it unless no reasonable mind could reach the same conclusion. Whatever the merits of the "substantial evidence" test as a device for appellate review in non-capital cases, it surely does not suffice in capital cases to insure that the death penalty is appropriate when measured by the facts of a particular case, especially when the burden of proving mitigation is on the defendant. In stark contrast to Ohio's procedure is the Florida procedure sustained in Proffitt v. Florida, U.S. 49 L. Ed. at 923, "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida". (Emphasis added.)

In none of the twenty-five cases in which the Ohio Supreme Court has sustained the death sentence has it even attempted to compare the case with any other case in which the death sentence was imposed or with any case in which the death sentence was averted.

In several cases, as indicated earlier, the Ohio Supreme Court has purported to interpret various mitigating factors broadly for the benefit of the defendant. These expansive readings could hardly have been anticipated by the trial judges who imposed the death sentence, and it is likely that they used narrower standards in holding that mitigation had not been proved. Despite this, the Ohio Supreme Court has not remanded a single case for a new sentencing hearing to be conducted pursuant to the newly articulated standards. Rather, in every case, the Court has simply reviewed the record as made, without even inquiring whether the standards used by the sentencer were compatible with the standards thereafter announced.

The Ohio Supreme Court, in the case of Woods, supra, while complaining that it had not received the pre-sentence report, proceeded to review the record without it, and affirmed the death sentence. Likewise in the instant case, the Court made no mention of the propriety of the penalty imposed upon Petitioner either comparitively or as specially applied in the mitigation hearing.

In Proffitt v. Florida, supra, at 923, this Court observed that the Florida Supreme Court had set aside the death sentence in eight of twenty-one cases, thus evidencing scrupulous appellate review. The Ohio Supreme Court has reviewed twenty-six death sentence cases. It has set aside the conviction and sentence in one for evidentiary error unrelated to the penalty. In each of the twenty-five remaining cases, however, it has affirmed the death sentence.

Whether Ohio's system of appellate review is adequate to comply with Eighth Amendment standards is a substantial constitutional question which should be resolved by this Court.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S DENIAL OF PETITIONER'S REQUEST FOR A CONTINUANCE DEPRIVED PETITIONER OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW.

Petitioner argues that he was denied his Fifth, Sixth and Fourteenth Amendment rights to the effective assistance of counsel and due process of law when the Trial Court refused to grant defense counsel's motions for a continuance. The offense for which Petitioner was tried occurred on December 16, 1974. Defendant was indicted on December 23, 1974, and counsel was appointed on January 7, 1975. Defense counsel conscientiously filed a request for discovery on January 7, 1975, pursuant to Criminal Rule 14, Ohio Rules of Criminal Procedure. The case was scheduled for trial on February 18, 1975. After waiting the appropriate number of days, defense counsel on January 28, 1975, filed a motion with the Trial Court, as discovery had still not been provided. Along with the motion for discovery, counsel requested a continuance, alleging that the failure to provide discovery had "seriously hampered the ability of counsel to adequately counsel and represent the Defendant." Counsel's memorandum in support of his motion included the following language:

> ... It is felt that such efforts are presently insufficient to guarantee to the defendant his right of effective assistance of counsel.
> ... Counsel for the defendant has spoken to Mr. James O'Grady, Chief Trial Counsel for the Prosecuting Attorney, and was informed that Mr. O'Grady had no objections to a continuance of trial of this defendant until completion of the trials of other parties allegedly involved in the instant offense.
> ... Counsel for the defendant further asserts that additional time is necessary for the completion of research of legal issues presented by the present case, and, necessarily research will be affected by the nature of the material as yet to be received from the Prosecuting Attorney.

When the requested discovery was finally provided on February 4, 1975, it left defense counsel a mere fourteen days in which to interview nearly sixty witnesses and to otherwise prepare for trial. Faced with this unworkable situation, defense counsel on February 5, 1975, filed a supplemental memorandum with the Court in which he argued the necessity for a continuance. Counsel's memorandum concluded:

> Insufficient time remains available to counsel to render effective assistance to their client at a trial scheduled to commence February 18, 1975.

The Trial Court did not grant a continuance. As a result, counsel was unable to interview some witnesses, including Robert Boswell and Michael Goins, key witnesses for the State, prior to trial. Boswell was an important witness for the State of Ohio at trial, yet defense counsel was unable to determine his address or whereabouts before trial began. Petitioner objected to Boswell's testimony at trial on the grounds that he was not provided with proper discovery, i.e., a new address for Boswell which the prosecution had 10 days before trial but never provided to defense counsel, but was overruled. (Tr.231). Petitioner also objected to the testimony of Stephen Molnar, Jr., Chief Firearms Examiner for the Ohio State Bureau of Criminal Investigation, concerning firearms comparison tests conducted just two days before the trial began because he was not provided with the results thereof prior to trial. (Tr. 156). This objection was also overruled. Petitioner now argues that the overruling of his motions for a continuance was, under these circumstances, an abuse of discretion which resulted in a denial of his rights to the effective assistance of counsel.

It has been repeatedly recognized that the right to counsel guaranteed each criminal defendant through the Fourteenth Amendment means the right to effective counsel. Where conditions are such that a criminal defendant is accorded ineffective assistance he has been denied a basic constitutional right. Beasley v. United States, 491 F. 2d 627 (6th Cir. 1974). However, the right to effective counsel can be denied where counsel is not given an adequate opportunity to render effective assistance. For example, appointment of counsel so late that an adequate time to prepare a defense is precluded, can constitute ineffective assistance. At least one judicial circuit has held that tardy appointment of counsel constitutes ineffective assistance per se. Coles v. Peyton, 389 F. 2d 224 (4th Cir. 1968).

Petitioner maintains that the failure to grant an obviously essential continuance in a death penalty case likewise constitutes a denial of his right to the effective assistance of counsel. To be sure, the inability of counsel to interview key witnesses for the State and not be aprised of the firearms test results prior to trial seriously hampered counsel's judgment regarding plea bargaining. However, more importantly, counsel's unawareness of this evidence effectively prevented him from adequately preparing for cross-examination. Counsel's

requests, in light of these facts, was terribly necessary and the Trial Court's denial rendered counsel practically ineffective in these areas. Numerous federal Courts have considered this issue, and while all agree that the grant of a continuance is within the sound discretion of the Trial Court, each case must be analyzed on its own facts to determine if an abuse of discretion leading to a constitutional violation has occurred. In the leading case on the subject, Ungar v. Sarafite, 376 U.S. 574 (1964), the Court observed:

> The matter of continuance is traditionally within the discretion of the trial judge and it is not every denial of a request for more time that violates due process... Contrariwise, a myopic insistence upon expeditiousness in the fact of a justifiable request for a delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case... (p. 590).

Petitioner argues that the instant case represents the type of situation described in Ungar. The instant case, being a capital case, is of a character which demands strick adherence to principles of fairness. It is essential that in a prosecution which may result in a death sentence, the defendant be accorded every opportunity to adequately prepare and present his evidence. Where the defense is confronted with a list of 60 witnesses just fourteen days before trial and counsel represents he cannot adequately be prepared, the interests of justice require that a continuance be granted. Moreover, the instant case involved a complex set of facts suggesting that a group of persons were involved in a conspiracy to commit a murder-for-hire. Inasmuch as a determination of Petitioner's guilt turned on a careful examination of his interaction with others, it was especially crucial that his counsel be provided an adequate amount of time to interview the numerous witnesses, evaluate the evidence, and assemble a case.

Of the United States Courts of Appeals which have considered such claims, none has presented so compelling a case in favor of the necessity of a continuance. Nonetheless, federal Courts have acknowledged that the unjustified refusal to grant a continuance may result in a violation of the right to counsel. In United States v. Collins, 435 F. 2d 698 (7th Cir. 1971), the 7th Circuit found no abuse of discretion in the failure to grant a continuance where it determined that the case was uncomplicated. the defense had already been granted one continuance, and there were only two witnesses to be interviewed by counsel. Similarly, in United States v. Frattine, 501 F. 2d 1234 (2nd Cir. 1974), the

Court found no abuse of discretion or denial of constitutional rights where the continuance was sought for the purpose of bringing in additional evidence which the Court found to be probably cumulative. Nonetheless, Judge Friendly dissented, arguing that the defense should not be put to the task of proving the desired evidence was not merely cumulative. The dissent found on these facts "an arbitrary denial of his counsel's requests for a continuance." p. 1238. See also Stans v. Gagliardi, 485 F 2d 1290 (2nd Cir. 1973), where the Court emphasized the importance of favoring the interests of justice over a desire to keep an efficient Court docket.

Petitioner urges that the refusal of the Trial Court to grant his counsel's request for a continuance, on the facts of this case, clearly represented an abuse of discretion which rose to the level of a constitutional violation. Petitioner, therefore, urges this Court to grant certiorari to consider whether he has been denied his Fifth and Fourteenth Amendment rights to due process and the effective assistance of counsel.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S ACTION IN ALLOWING, OVER OBJECTION, THE ADMISSION OF HEARSAY EVIDENCE CONCERNING A TAPE RECORDING OF A CONVERSATION BETWEEN TWO KEY STATE WITNESSES, AND THEN FAILING TO INSTRUCT THE JURY TO DISREGARD THIS TESTIMONY AFTER REFUSING TO ADMIT THE TAPE INTO EVIDENCE, VIOLATED PETITIONER'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW.

Throughout Petitioner's trial, the jury's attention was repeatedly directed by the prosecution to the existence of a tape recording made by detective Ronald Price. (Tr. 222, 223, 229, 230, 239, 264, 269). The recording was of a conversation between two key State's witnesses, Robert Boswell and Michael Goins. Defense counsel entered a continuing objection to any testimony concerning the existence or contents of the tape. Over objection, the Court allowed repeated reference to the tape by witnesses Price and Boswell, allowed parts to be played before the jury, and allowed some testimony concerning the substance of the tape. Later in the State's case, the Court found that the tape recording itself constituted highly prejudicial hearsay evidence and ruled that it could not be admitted into evidence. (Tr. 328).

Petitioner argues that the Court's failure to instruct the jury to disregard the repeated testimony concerning the tape, on the facts of the case, constituted a denial of his Fifth, Sixth and Fourteenth Amendment rights to

a fair trial and due process of law. While Trial Counsel did not specifically request such a curative instruction, he had objected repeatedly to the testimony about the tape, and the failure to give a curative instruction must be regarded as plain error, within the meaning of Ohio Rules of Criminal Procedure, Rule 52(B), which reads:

> Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Petitioner argues that on the facts of this case, the failure of the Court to properly instruct the jury concerning the tape must be regarded as having denied him substantial constitutional rights. It is difficult to assess with precision the effect which the persistent references to the tapes had upon the jury, but it is clear that they were time and again told that in effect the State had in its possession highly damaging evidence implicating Petitioner in the murder plot. The much talked about tape, and the prosecution's relentless efforts to have it admitted, most of which occurred in the hearing of the jurors, doubtedly created the strong inference that if it were played in its entirety, it would have added credibility to the testimony of Boswell and Goins, the State's two key witnesses.

In affirming Petitioner's conviction and death sentence, the Ohio Supreme Court acknowledged that it was largely on the testimony of Boswell and Goins that Petitioner was convicted. As the Court observed:

> According to Boswell, Weind stated that he and Carl Osborne were responsible for the murder and that Carl actually fired the fatal shots. Weind told Boswell that when Mrs. Ross struggled on the Ontario store parking lot, he hit her on the head with a gun... Weind, supra, p. 238.

In reviewing the totality of the evidence, the Court demonstrated that it was the testimony of Boswell and Goins which, if believed, provided the most convincing evidence against Petitioner. In light of this finding, any errors at trial which had the effect of adding credibility to the stories of Boswell and Goins were highly prejudicial. The Court erred in allowing the considerable amount of testimony concerning the tape over the continuing objection of defense counsel, but more importantly, irreparably damaged Petitioner's rights to a fair trial and due process when it elected not to instruct the jury to disregard all testimony concerning the tape, which the Court found to be highly inflammatory. In short, the tape recording had no place at Petitioner's trial and it was the Court's

duty to take its own initiative to guarantee that the existence of the tape play no part in the determination of Petitioner's guilt or innocence.

The response of the Ohio Supreme Court to this argument was highly confusing and indicative of a callous attitude toward Petitioner's fundamental rights. The Court observed:

> In the instant case, failure of the trial judge to give the jury specific instructions regarding the tapes did not constitute an error that affected the defendant's substantial rights under Crim. R. 52(B) since mention of the tapes by the judge would have called the jury's attention to them to the prejudice of the defendant. (Emphasis added). Weind, supra, p. 237.

To suggest that a curative instruction would further prejudice Petitioner is an untenable position. It has been recognized that a curative instruction is presumed by our legal system to cure error. United States v. Rojas, 537 F. 2d 216 (5th Cir. 1976); United States v. Wells, 431 F. 2d (6th Cir. 1970).

Further, there is ample support for the proposition that if substantiated rights of the Defendant are involved, the curative instruction should be given sua sponte. United States v. Roundtree, 527 F. 2d 16 (8th Cir. 1975); United States v. Esquer, 459 F. 2d 431 (7th Cir. 1972), cert. denied, 414 U.S. 1006. As the D.C. Circuit Court of Appeals noted in United States v. Bernett, 495 F. 2d 943, at 963:

> New trials will be granted where the omitted instruction deals with a legal principle of such magnitude that had the jury considered it, the verdict could have been substantially affected.

Petitioner contends that this test applies to his conviction. The added credibility which the testimony concerning the tape added to the testimony of Boswell and Goins could well have substantially affected the verdict. A capital case is far too serious a matter to overlook such a potentially prejudicial and damaging error. Petitioner, therefore, urges this Court to grant certiorari to consider this issue of great importance.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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Franklin County Public Defender

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and

By _____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was personnally delivered to the Office of the Prosecutor, Franklin County Hall of Justice, Columbus, Ohio 43215, this 23rd day of November, 1977, in compliance with Rule 33(1) of the Rules of the United States Court.

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APPENDIX A

# Supreme Court of the United States

*No.* A-290

JAMES KENNETH WEIND,

Petitioner,

v.

OHIO

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## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 25, 19 77.

/s/ Potter Stewart
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of September, 19 77.

APPENDIX B, is the Opinion of the Court in State v. Weind (1977), 50 Ohio St.2d 224., and has not been reproduced here.

APPENDIX C

*THE STATE OF OHIO,*
*City of Columbus.*

State of Ohio,
Appellee,

*vs.*

James Kenneth Weind,
Appellant.

*19 77 TERM*

*To wit:* July 8, 1977

*No.* 76-1128

REHEARING

It is ordered by the court that this motion be denied.

*I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....*

*IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this* 23rd *day of* November, *19* 77

THOMAS L. STARTZMAN *Clerk.*

*By* [signature] *Deputy.*

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 75AP-355 |
| James Kenneth Weind, | : | |
| Defendant-Appellant. | : | |

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D E C I S I O N

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McCORMAC, J.

Appellant was charged with two counts of aggravated murder (R. C. 2903.01) and one count of kidnapping (R. C. 2905.01), all pertaining to the alleged kidnapping and murder of Hermalee Ross on December 15, 1974. It was further specified by the grand jury that the aggravated murder was committed with prior calculation and design during a kidnapping (R. C. 2929.04[A][7]) and that the offense was committed for hire (R. C. 2929.04[A][2]). Appellant was found guilty of all charges and specifications. Two codefendants were also tried separately upon the same charges, found guilty and given death sentences.

Following the guilty finding by the jury, the trial judge, as required by R. C. 2929.03, ordered a presentence investigation and psychiatric examinations to be made and reports submitted to the court, and heard testimony and other evidence pursuant to R. C. 2929.03 (D). Upon consideration thereof, the court found that none of the mitigating circumstances listed in R. C. 2929.04 (B) had been established by a preponderance of the evidence and imposed the sentence of death as required by law. From that judgment appellant has filed a timely notice of appeal, setting forth the following assignments of error:

> "(1) The court erred by abusing its discretion in overruling defendant's motion for a continuance and this violated defendant's constitutional rights.
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> "(2) Defendant was denied fundamental fairness inherent with his constitutional right to due process of law and a fair trial when discoverable information requested and moved for earlier by counsel for defendant was not so provided.

"(3) The trial court erred in not granting defendant's motion for mistrial or in ordering the same upon the repeated examples of trial publicity and in not effectively instructing jurors to disregard the same.

"(4) The court erred in calling Michael Goins as a court witness and in applying the wrong legal standard to Mr. Goins' status when he testified.

"(5) The trial court erred in not instructing the jury to disregard all testimony regarding alleged tape recordings between witness Boswell and witness Goins and especially as to the substance after it had ruled that they would not be admitted into as evidence.

"(6) The trial court erred in admitting into evidence hearsay testimony thus denying defendant his right to confrontation and due process of law.

"(7) The jury verdict of guilty in this case is not supported by sufficient evidence and hence is contrary to law.

"(8) The court erred in not requiring the prosecuting attorney to elect which count of aggravated murder he wanted to go to the jury.

"(9) The trial court erred when it refused to charge the jury on the lesser included offense of obstruction of justice and recharged the jury on aggravated murder when, in light of the repeated requests for re-reading of testimony, a hung jury should have been declared.

"(10) Section 2929.04 O.R.C. is unconstitutional in that it violates the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 9 of the Constitution of Ohio.

"(11) The death penalty offends contemporary standards of decency and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States.

"(12) Section 2929.03 is unconstitutional on its face and/or unconstitutional as it is applied.

"(13) The sentencing stage following a conviction for aggravated murder with specifications is unconstitutional and the trial court applied an erroneous legal standard during the mitigation hearing.

"(14) If the court is correct and there is no burden on either party, the court clearly abused its judicial discretion in not finding the existence of mitigating circumstances."

The prosecution presented direct and circumstantial evidence which, if believed by the jury, proved that appellant had been paid $500 to participate in the kidnapping and murder of Hermalee Ross on December 15, 1974. The initial kidnapping took place in Franklin County after which the victim was transported to Delaware County, where she was murdered in an abandoned schoolhouse by shots from a handgun. Further facts will be discussed in relation to the assignments of error to which they are pertinent.

The court will first consider assignments of error ten through fourteen, which relate to the constitutionality of the death penalty in Ohio as imposed in this case, including the procedure utilized herein.

Subsequent to the decision of the United States Supreme Court, in *Furman v. Georgia* (1972), 408 U. S. 238, 92 S.Ct. 2726, the Ohio General Assembly enacted new state laws (R. C. 2929.02 through 2929.04), effective January 1974, reinstating the death penalty in Ohio, the previous Ohio

provisions for imposition of the death sentence having been rendered unconstitutional by the *Furman* decision. A review of the Ohio provisions for the death penalty to determine the constitutionality thereof is necessary since the United States Supreme Court has recently set forth guidelines for that determination by five decisions rendered on July 2, 1976, applicable to the statutory scheme adopted by legislatures in other states who had also reacted to the *Furman* decision by adopting revised provisions for implementation of the death penalty. *Gregg v. Georgia, Proffitt v. Florida, Jurek v. Texas, Woodson v. North Carolina, Roberts v. Louisiana* (1976), 44 U. S. Law Week 5229-5292. In none of these cases was the Ohio method specifically discussed although, as will be related hereafter, the aforesaid decisions apply the basis for a determination of the validity of the Ohio laws.

R. C. 2929.04 (A) sets forth seven aggravating circumstances, at least one of which must be found by a jury to justify the death penalty. Those are:

> "(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

"(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

"(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary."

Thus, the Ohio law permits a finding of aggravating circumstances giving rise to consideration of the death penalty only in the instance of one or more of the seven specified types of aggravating circumstances in conjunction with a murder. Two of those circumstances were presented to the jury in this case and found to exist as a fact beyond a reasonable doubt. Those were murder for hire and murder while committing the crime of kidnapping.

R. C. 2929.03 (E) makes mandatory the imposition of the death penalty where the requisite factual findings have been made by the jury beyond a reasonable doubt, unless the trial court makes a factual finding by a preponderance of the evidence that one or more of the mitigating circumstances set forth in R. C. 2929.04 (B) is involved. R. C. 2929.04 (B) provides, as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:
>
> "(1) The victim of the offense induced or facilitated it.
>
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

As we pointed out in the case of *State v. Harris*, unreported case number 74AP-580 (1975 Decisions, page 1316), under Ohio law no discretion is vested in the court or jury as to whether to impose the death penalty under this method. On the other hand, certain factual determinations are required to be made. The jury must separately determine whether the defendant is guilty of aggravated murder and whether he is guilty of the particular form

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of aggravated murder which requires imposition of the death penalty. If the jury so finds, the trial court must then make a factual finding as to the existence of one or more of the mitigating circumstances. The court has no discretion as to whether or not to impose the death penalty, but must impose it unless it is established by a preponderance of the evidence that at least one of the three mitigating circumstances exists, and cannot impose the death penalty otherwise.

In light of the recent decisions of the United States Supreme Court, we must first consider whether the general statutory scheme in Ohio meets constitutional muster. If the answer to that question is in the affirmative, we must then consider whether the particular application of those laws to the case at hand meets constitutional and legal requirements.

The first issue, which is now easily answered, is whether the death penalty in itself violates the prohibition against cruel and unusual punishment, prohibited by the Eighth Amendment to the Constitution of the United States. That question was left unanswered in *Furman*, but was unequivocally answered to the contrary in *Gregg v. Georgia*. The United States Supreme Court pointed out that history and precedence strongly support a negative answer to this question. Legislative response, as indicated by the Ohio statute, demonstrates society's endorsement of the death penalty for murder. In short, a local determination that capital punishment may be necessary in some cases has not been demonstrated to be clearly wrong. However, because capital punishment is unique in its severity and irrevocability, the Supreme Court has stated that the punishment of death must not be disproportionate in relation to the crime for which it is imposed. In Ohio, as in Georgia, capital punishment has been imposed only for the crime of

murder, where a life has been taken deliberately by the offender, in which instance the United States Supreme Court held that it cannot be said, as a constitutional proposition, that the punishment is invariably disproportionate to the crime. Thus, the death penalty provided for in Ohio is not in itself constitutionally invalid.

The next issue is whether the Ohio method for imposing the death penalty creates a substantial risk that it will be inflicted in an arbitrary and capricious manner, as prohibited by the court in *Furman*. "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia, supra.*

Georgia, as Ohio, narrowed the class of murders subject to capital punishment by specifying ten statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can be imposed. Ohio has listed only seven such circumstances, all of which are very similar to those approved in Georgia and those referred to in the model penal code, referred to with approval as guidance in the *Gregg* decision. Thus, the nature of offenses for which aggravated murder with specifications can be found in Ohio is guided by standards sufficiently specific to eliminate the element of capriciousness prohibited in the *Furman* case. The fact that the jury has the power to decline to impose the death penalty, by failing to find one or more statutory aggravating circumstances

to be present, does not create a substantial risk of arbitrariness or caprice. *Gregg v. Georgia.* The test is that of discretion, controlled by clear and objective standards, rather than total lack of discretion.

To this point, the Georgia method is similar to that in Ohio; however, the two systems deviate at this point. The Georgia system requires the State Supreme Court to review the comparability of each death sentence with the sentences imposed on similarly situated defendants, to insure that the sentence of death in a particular case is not disproportionate, as well as providing a bifurcated proceeding at which the sentencing authority is apprised of the information relative to the imposition of sentence, and provided with standards to guide its use of that information. Another basic difference between Georgia and Ohio is that more specific mitigating circumstances are permitted in Georgia than in Ohio. In addition, the court finds mitigating circumstances in Ohio rather than the jury. In both states there is a constitutional right of appeal to the highest court in the state, the Supreme Court, but in Ohio there is no specific provision for comparing death sentences in one case to those in another.

The first question that arises is whether the three mitigating circumstances in Ohio are sufficient to pass constitutional muster. A review of those factors indicates that they are. Two of them are similar to those set forth in the model code. Those are that the victim of the offense induced or facilitated it or that the offender was under duress, coercion or strong provocation. The other mitigating circumstance in Ohio combines the remaining factors set forth in the model code. The specific

mitigating factor is that the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity. In considering this mitigating circumstance, the court is instructed to consider the nature and circumstances of the offense and the history, character and condition of the offender. This permits, if not instructs, the court to consider factors such as prior history of criminal activity, the amount of participation by the defendant when accomplished by another person, the youth of the defendant at the time of the crime, as well as the mental and physical condition of the defendant. The fact that the trial judge makes this determination in the bifurcated trial, rather than the jury, does not render the Ohio method unconstitutional.

In Florida, a jury renders an advisory verdict, but the final determination is by the court who is not required to follow the jury's recommendation of mercy if the facts are clear and convincing in suggesting a death penalty so that virtually no reasonable person could differ. That method is constitutional. See *Proffitt v. Florida*. As the Supreme Court pointed out in *Proffitt*, judicial sentencing should lead to greater consistency in sentencing, as a trial judge is more experienced in sentencing than a jury. The fact that determination of mitigating circumstances and subsequent sentencing is exclusively placed in the hands of the trial court in Ohio is proper.

The fact that Ohio has not specified standards for review and comparison of death sentences as does Georgia and Florida does not invalidate

the Ohio procedure. Ohio, like Texas, provides for automatic and prompt judicial review of capital sentences by the highest court in the state. Thus, a constitutional means of review is provided to assure the even-handed, rational and consistent imposition of death sentences under law.

In Texas, although there is no specific reference to mitigating circumstances, the jury is required to focus on the particularized nature of the crime, thus eliminating the arbitrariness and caprice of the system invalidated in *Furman*. See *Jurek v. Texas*. In Chio, the jury must find the existence of aggravating circumstances beyond a reasonable doubt. The court must make a factual finding of mitigating circumstances.

A review of the five cases shows that a proper system must provide a method for fact finding as to both aggravating circumstances and mitigating circumstances. Ohio provides both, albeit in a slightly different form than in *Gregg, Proffitt* or *Jurek*. Clear standards are provided for both determination of aggravating circumstances and determination of mitigating circumstances, contrary to the North Carolina system, where no standards were provided to guide the jury in determining which murderer shall live and which shall die, thus treating all persons convicted of a designated offense as members of a faceless, undifferentiated mass. See *Woodson v. North Carolina*. The Louisiana method was also declared unconstitutional as the mandatory death penalty statute required execution of the death penalty regardless of any mercy recommendations, but permitted the jury to consider verdicts on the lesser charges of second-degree murder and manslaughter, even if no evidence supported the lesser verdicts. *Roberts v. Louisiana*.

In substance, the five cases decided by the United States Supreme Court establish three factors that must be contained within a system for imposing the death penalty in order for it to meet constitutional muster against arbitrariness or caprice. First, there must be a reasonably definitive system for reaching a factual finding as to the existence of aggravating circumstances. Ohio requires such a finding by the jury beyond a reasonable doubt. Second, there must be opportunity for consideration of mitigating circumstances of a sufficiently definitive nature. Ohio provides for consideration of all relevant mitigating circumstances in a sufficiently definitive way to meet constitutional muster. The fact that the finding is by the court, rather than the jury, does not affect the constitutionality of the Ohio statutes. Third, there must be opportunity for appellate review in death penalty cases, inferentially by the highest court in the state, who can provide the degree of uniformity by their review necessary to act as a safeguard against arbitrary imposition of the death sentence on a different basis in one section of the state than in another. The nature of the review need not be set forth specifically. Ohio has provided that opportunity by making mandatory the review of death penalty cases by the Ohio Supreme Court.

None of the systems reviewed by the United States Supreme Court involve a jury finding of aggravating factors beyond a reasonable doubt and a finding by the trial court of mitigating circumstances by a preponderance of the evidence. It is our opinion that this system not only meets constitutional muster, but also that it is the best method for uniform imposition

of the death penalty, once the policy decision to provide the death penalty has been made. At the point that the court considers mitigating circumstances, we have had a unanimous jury finding that a specific aggravating circumstance existed beyond a reasonable doubt. At that point, it is appropriate, within the local legislative prerogative, to require an affirmative finding by the preponderance of the evidence that there was some specific factor in the nature of the crime or propensity of the individual to mitigate the death penalty that would otherwise follow. In the bifurcated trial, there is an opportunity at this point to place before the court all circumstances relating to the consideration of mercy to the defendant. The trial court is required to order a presentence investigation and a psychiatric examination to be made with copies of the reports to be furnished to the offender and his counsel. The offender may make a statement without being subjected to cross-examination, if he chooses not to be under oath. While the procedure for inflicting the death penalty may place a greater burden upon the defendant in regard to mitigating circumstances than in some other systems, it also provides a fair and nonarbitrary system for that determination. It is within local legislative discretion to require that the mitigating circumstances be shown by the preponderance of the evidence Knowledge of mitigating circumstances is much more peculiarly within the hands of the defendant than the prosecution. The defendant has no specific burden to produce proof of mitigating circumstances and the court has the burden to order evidence to be produced by objective outsiders not connected to either the prosecution or the defendant.

Consequently, in light of the recent decisions of the United States Supreme Court, the statutory scheme for enforcement of the death penalty in Ohio meets constitutional muster and is not in itself improper. Proof of lack of mitigating circumstances is not an affirmative defense nor an item of proof placed upon the prosecution by R. C. 2901.05. As in many other criminal cases, the court is given the authority to mitigate punishment that would otherwise be applicable by individually reviewing circumstances concerning the crime and the individual who committed it. The only basic difference is that more specific guidelines are provided for the court to consider in finding mitigating circumstances to control its discretion within constitutional limits.

Assignments of error ten through thirteen, all of which challenge the general system of determining death sentences in Ohio, are overruled.

The only specific attack upon the procedure herein is contained in the fourteenth assignment of error, where it is charged that the court abused its judicial discretion in not finding the existence of mitigating circumstances.

Following the jury verdict of guilty of aggravated murder with specifications, the court ordered a mitigation hearing, as required by R. C. 2929.03 (D). Prior to the hearing, the court ordered a presentence investigation and referred the defendant for two psychiatric examinations. The hearing was conducted by the court, calling the psychiatrists to the stand and first examining them himself. The first psychiatrist, Dr. Jack Morganstern, testified that he is board certified in adult, child and

administrative psychiatry, and is executive director of the Columbus Area Community Mental Health Center. Dr. Morganstern testified that he found no evidence of psychosis, mental deficiency or other psychiatric disorder on the part of the defendant. The court permitted ample opportunity for cross-examination by both the state and the defense counsel. The second psychiatrist, Dr. Jaime Smith e Incas, who is an associate professor of psychiatry at Ohio State University College of Medicine, testified as to his examination of defendant. The only evidence of mitigating factors that he stated was that the defendant felt he had been seduced into the situation that he found himself in, to wit, convicted of aggravated murder with specifications, by "helping a friend." Dr. Smith e Incas, at the first hearing, ended up by stating that he would like a further opportunity for examination before submitting a final opinion. He was given that opportunity and, after further examination, he was simply unable to state that the defendant was under a psychosis at the time of the murder. The chief probation officer of Franklin County also testified and stated that their investigation revealed no evidence of mitigating factors. The only other witnesses at the mitigation hearing were the defendant's mother and a friend of his mother's, both of whom testified that he was not a violent person and that they believed him not to be capable of the violence herein.

The appellant complains that the psychiatrists who testified should have been more definite as to their conclusions, rather than stating that they did not know whether he was a victim of psychosis or that he possibly could have been. That complaint is not well taken.

The court conducted a fair mitigation hearing, completely in accord with the statute and permitted ample opportunity for all sides to cross-examine witnesses or produce testimony. There was simply no substantial evidence of mitigating circumstances. A mere possibility is not sufficient. We presume that such possibility would exist in virtually every case of this type, as it is not likely that a "normal" person would agree to participate in the kidnapping and murder of a stranger who had never done anything to them for the payment of $500. The defendant did not choose to make a statement, either under oath and subject to cross-examination, or not under oath. From the state of the evidence, it would be difficult to see how the trial court could come to any other conclusion than that mitigating circumstances had not been shown by a preponderance of the evidence. Assignment of error number fourteen is overruled.

The seventh assignment of error is that the verdict of guilty is not supported by sufficient evidence and is contrary to law. This assignment of error requires a review of the evidence upon which the defendant was found guilty of all counts.

An impressive chain of direct and circumstantial evidence was produced, linking appellant to the scene of the abduction of the victim on Morse Road and the scene of the murder in Delaware County, although there were no direct witnesses to the murder, other than the participants. Appellant was also linked with Carl E. Osborne, Jr., also found guilty of aggravated murder with specifications, case number 75AP-423. Appellant

was identified as involved in the cleaning and changing of tires of the car identified as being used for the kidnapping and transmitting of the victim to the scene of the murder. However, by far the most incriminating evidence was the testimony of two neighbors of appellant, who lived in the same apartment complex. Robert Boswell testified that, on the morning of the murder, around 11:00 a.m., the appellant came to his apartment and told Boswell he had something for him, giving him a box with cotton, in which there was a weapon. Boswell identified state's exhibit 20, a .25 caliber Raven Automatic, as the weapon given to him. Boswell told Michael Goins, also a neighbor, about the transaction. Goins came over to the apartment and told Boswell that the "gun was hot." Appellant then related to Boswell and Goins details of the killing of Hermalee Ross earlier that morning. Boswell testified that appellant told them that he and Carl Osborne had abducted Mrs. Ross at the Ontario parking lot and that, during the course of the abduction, appellant had hit the victim on the head with a second gun when she put up a struggle. Boswell stated that this gun was a .380 automatic and he identified state's exhibit 37 as being the same type of gun. Appellant told Boswell that, when he hit the woman, a piece of the gun broke off. At the scene of the abduction, officers collected two pieces of metal, identified as being portions of the trigger guard of a firearm. The appellant and the two neighbors then drove in appellant's car to the vicinity of Alum Creek, where the appellant threw the murder weapon into the creek and from where the gun was ultimately retrieved, being the same .25 automatic pistol previously identified by Boswell, and

also identified as the murder weapon by Steve Molnar, a ballistics firearms expert. Boswell also testified that appellant had stated that he was paid $500 by Alberta Osborne, also convicted of aggravated murder with specifications, case number 75AP-327, for his part in the kidnapping and murder.

In summary, there was overwhelming evidence, both direct and circumstantial, of appellant's participation in the planned kidnapping and murder for hire of Hermalee Ross. Assignment of error number seven is overruled.

In his first assignment of error, appellant complains of abuse of discretion in overruling appellant's motion for a continuance. On January 28, 1975, appellant filed a motion and memorandum in support, including a request to continue the case set for February 18, 1975. The reasons set forth were primarily that the prosecution had not yet provided full discovery and the defense needed time to research legal issues. On February 4, 1975, the prosecution filed their discovery in the case, which was followed by appellant's supplemental memorandum in support of a motion for a continuance.

Granting of a continuance is within the discretion of the trial court. There are the competing interests of speedy disposition of criminal matters and providing a reasonable opportunity to prepare an adequate defense. The Ohio Supreme Court has discussed the test to be used in ruling on this assignment of error, as follows:

> "Has the defendant, in light of the record, received zealous and earnest counsel, and has appointed counsel performed its full duty intelligently and well."

*State v. Price* (1973), 34 Ohio St. 2d 43(at 47).

A review of the entire record indicates that the defense represented appellant as effectively as permitted by the facts of the case, and that the trial court did not abuse its discretion in refusing to grant a continuance requested approximately three weeks before the date that the trial was scheduled to commence. It is further noted that defense counsel did not renew the request for continuance at the time of the commencement of the trial, but, instead, stated that he was ready to proceed. Assignment of error number one is overruled.

The second assignment of error is that appellant was denied fundamental fairness, inherent with his constitutional right to due process of law and a fair trial, when discoverable information requested and moved for earlier by counsel for defendant was not so provided.

Appellant cites two occasions when he claims that discovery was not provided in a timely manner. The first relates to the testimony of Mr. Molnar, the chief firearms examiner for the Ohio State Bureau of Criminal Investigation, who testified that the two pieces of metal found in the Ontario parking lot were from the trigger guard of a hand gun, similar to state's exhibit 37. The second complaint is that the prosecution failed to provide a current address for Robert Boswell who had changed his address since the time that his address was provided to appellant in response to discovery.

Crim. R. 16 (D) provides as follows:

> "If subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection."

In essence, the complaint herein is not that the original discovery provided appellant was inadequate, but that during the course of the investigation and after initial discovery further information came to the attention of the prosecution, who failed to timely supplement its discovery under its continuing duty to disclose pursuant to Crim. R. 16 (D).

An examination of the record discloses that the original discovery material totaled twenty-one pages, including a list of the names and addresses of prospective witnesses, one of whom was Robert Boswell. At the trial, Robert Boswell was produced by the prosecution as an important witness and appellant's counsel objected to his testimony, complaining that appellant had been unable to contact Boswell prior to the trial because he had changed his address. The record also indicates that the prosecution became aware of the change of the address approximately ten days prior to the trial and did not supplement its discovery by informing defense counsel of Boswell's new address. However, the record also supports a finding that defense counsel did not inform the prosecution that he was unable to contact Boswell because of the change of address until Boswell was called as a witness.

While there is a continuing duty to supplement previous discovery, including the changed address of a witness, the trial court is vested with discretion as to sanctions, if any, considering all aspects and consequences thereof. Upon a failure to supplement discovery being brought to the attention of the trial judge, he must consider sanctions in the interest of justice, as set forth in Crim. R. 16 (E)(3), as follows:

> "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

The court, within its discretion, permitted Boswell to testify, as the record did not indicate that defendant contacted the prosecution to try to ascertain an up-to-date address prior to trial. The efforts of defense counsel may be considered in exercising the court's discretion, as well as the duty of the prosecution to supplement its discovery. An oversight of the prosecution cannot be used unconscionably to prevent important testimony from being heard. Moreover, the record does not indicate that a continuance was requested by defendant in order to prepare for Boswell's testimony or that Boswell's testimony would have been any different or the cross-examination any more effective had Boswell's address been timely supplemented.

As to the location of the weapon that matched the pieces of metal in the parking lot, the record shows that such weapon was not located until February 18, 1975, the day that the trial commenced. Hence, this testimony was not available to the prosecution until the day of the trial. The prosecution need not discontinue its quest for evidence because discovery has been supplied or the trial is commencing. There was no request for a continuance and the defense learned of the testimony fairly promptly. The trial court acted within its discretion in overruling defense counsel's objections to that evidence. Assignment of error number two is overruled.

The third assignment of error is that the trial court improperly overruled the defendant's motion for a mistrial, claiming that the trial court failed to protect jury members against prejudicial trial publicity.

The record shows that defense counsel, at the commencement of the proceedings, the morning after the jury was impaneled, brought to the court's attention a news article, which appeared in a Columbus newspaper the previous evening, referring to the case. At that time, the trial court asked each of the jury members individually whether they had read any news article which was published in the previous day's papers and all answered in the negative. Again, on the fourth day of trial, defense counsel stated that the morning edition of a Columbus newspaper had an article on the case, concerning tapes. A legal intern working for the defense counsel indicated to the trial court that he had seen two jurors reading the paper, but that he could not see which article. He also saw a third juror walk into the

courtroom with a newspaper under his arm. Once again, the court indicated to the jury that they were not to read any articles on the case, as they had been previously informed on more than one occasion, and then questioned the jury individually as to whether they had seen any article dealing with the case. Once again, the record indicates a negative response.

The procedure of the trial court was proper. The trial court determined to his satisfaction that his instructions concerning news accounts of the case had not been violated. No request was made by defense counsel for further inquiry or instructions. Assignment of error number three is overruled.

The fourth assignment of error is in regard to the testimony of Michael Goins. The court called Michael Goins as the court's witness, telling the jury that anything Mr. Goins testified to in the Weind trial will not be used as evidence against him in any trial in the future.

Appellant complains of two matters. First, appellant complains that the trial court failed to instruct the jury on "use immunity"; and, secondly, that the trial court should not have been permitted to call Goins as a witness of the court.

The first complaint is that the trial court failed to instruct the jury as to "use immunity." The record shows that the trial court, in effect, gave this instruction by telling the jury that any testimony that Goins gave could not be used as evidence against him in any other action. There was no objection to this statement or request for a more specific

"use immunity" instruction. Crim. R. 52 (A) requires this court to disregard any error, defect, irregularity or variance which does not affect substantial rights. Crim. R. 52 (B) permits only plain errors or defects affecting substantial rights to be noticed when not brought to the attention of the trial court. The error herein does not affect substantial rights and must be disregarded.

The second objection is to the trial court's calling Goins as its own witness. While the trial court may not take the role of an advocate, it is certainly within the trial court's prerogative to call a person as a court witness when that individual possesses knowledge material to a just determination. Frequently, both parties have reasons for not wanting to call a witness, although the testimony is important. As indicated in an authoritative annotation:

> "The authority of a trial judge to call a witness in a criminal prosecution as the court's witness on its own motion or at the request of one of the parties has been recognized in all jurisdictions in which the question has been considered."

See 67 A.L.R. 2d 538, "Courts witnesses (other than expert) in criminal prosecution."

The fifth assignment of error is that the trial court failed to instruct the jury to disregard all testimony regarding alleged tape recordings between witness Boswell and witness Goins, after ruling that the testimony would not be admitted into evidence.

The record shows that the trial court ultimately sustained objections to the admissibility of the tape recording without permitting the substance of the testimony to be heard by the jury, although there was preliminary testimony about the tapes. When the court conclusively ruled the tapes would not be admitted into evidence, there was no admonishment to the jury to disregard any testimony they heard about the tapes. No request was made for this instruction by defense counsel and no request for instruction was made at the conclusion of the trial court's charge to the jury.

Once again, Crim. R. 52 (A) permits this court to consider errors which were not raised at the trial court by proper objection only if it is a plain error affecting the substantial rights of the defendant. The error, if any, regarding the tapes in this case was not of that degree. Assignment of error number five is overruled.

The sixth assignment of error is that hearsay testimony was admitted, denying defendant his right to confrontation and due process of law. Two witnesses, Kay Osborne and Zebby Zweydorff, testified that Carl Osborne (codefendant separately convicted of the same charges) came into their room the morning of the murder and said that he and appellant were going to get something to eat and were using Kay Osborne's car, the car ultimately identified as the murder car. Defense counsel objected to this testimony and the trial court issued a written ruling, overruling the objection on the basis that there was ample evidence to establish, prima facie, that a conspiracy existed between Carl Osborne, Alberta Osborne and the defendant.

An exception to the hearsay rule exists for statements of coconspirators under rationale developed from partnership law that the statement of one coconspirator made in furtherance of the conspiracy is admissible against a coconspirator. This exception is summarized as follows:

> "Any act or declaration by one coconspirator committed in furtherance of the conspiracy and during its pendency is admissible against each coconspirator provided that a foundation for its admissibility is laid by independent proof of the conspiracy."
>
> 72 Harvard Law Review 922, at 985 (1959).

Both the United States Supreme Court and the Ohio Supreme Court have recognized the need for independent proof, or proof aliunde, as a prerequisite to admissibility. *Glasser v. United States* (1942), 315 U. S. 60; *State v. Carver* (1972), 30 Ohio St. 2d 280.

The trial court, by its ruling, demonstrated that it understood the rule and the necessity of proof of prima facie evidence that a conspiracy existed prior to admissibility of the declarations of a conconspirator as an exception to the hearsay rule. A review of the record indicates that the trial court ruled correctly, in that previous evidence by witnesses Boswell, Goins and Lowe provided evidence aliunde that appellant was engaged in a conspiracy with Carl Osborne to kidnap and kill the decedent. Assignment of error number six is overruled.

The eighth assignment of error is that the court improperly submitted two specifications of aggravated murder to the jury. In other words, the jury was permitted to consider and to find appellant guilty of both

murder for hire and murder while committing a kidnapping offense. As we have previously held, in *State v. Fluellen*, unreported case number 74AP-138 (1974 Decisions, page 1920), it is proper to submit both of the counts to the jury. Of course, when only one murder is involved, the defendant can only be sentenced for a single aggravated murder. Assignment of error number eight is overruled.

The ninth assignment of error is that the trial court refused to charge the jury on the lesser included offense of obstruction of justice and improperly recharged the jury on aggravated murder.

After the jury began its deliberation it requested, on two occasions, the rereading of testimony of certain witnesses. Thereafter, on the second day of deliberation, the jury requested the court to clarify the charge of aggravated murder by prior calculation and design. Over objection of defense counsel, this charge was replayed.

It is within the discretion of the court to replay certain portions of the trial testimony or to repeat portions of the charge as requested. The record does not disclose an abuse of discretion.

Moreover, the trial court did not err in refusing to charge on obstruction of justice. Obstruction of justice is not a lesser included offense of the charge of aggravated murder.

Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

STRAUSBAUGH, P.J., and REILLY, J., concur.

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APPENDIX E

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO,

CRIMINAL DIVISION

- - -

State of Ohio, :

Plaintiff, :

vs. : Case No. 76CR-12-3104

Dennis C. Burke, :

Defendant. :

- - -

EXCERPTS OF PROCEEDINGS

- - -

Taken before the Honorable Fred J. Snoemaker, Judge, Court of Common Pleas of Franklin County, Ohio, under date of February 15, 1977.

- - -

APPEARANCES:

Mr. Gerald Todaro, Assistant Prosecuting Attorney,
On behalf of the Plaintiff, State of Ohio.

Mr. Gary M. Schweickart and Mr. Thomas Vivyan,
On behalf of the Defendant, Dennis C. Burke.

- - -

Tuesday Afternoon Session,

February 15, 1977.

- - -

* * * * *

- - -

WILLIAM LAZAROW

Called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

MR. SCHWEICKART: If I may, Your Honor, I think to help focus things, and I'm sure for the Prosecutor, because he doesn't know why I called Mr. Lazarow, to give just a brief statement as to -- in the way of an opening statement, with respect to Mr. Lazarow's testimony on this motion, if I may.

THE COURT: Why don't you just ask him. I think we'll figure it out.

MR. SCHWEICKART: Okay, very good.

- - -

DIRECT EXAMINATION

By Mr. Schweickart:

Q. State your name, please?

A. William Lazarow.

Q. And what is your occupation, sir?

A. I am an attorney. My office is located at 16 East Broad Street, Columbus, Ohio.

Q. Mr. Lazarow, very recently have you had an opportunity to be represe. ng anyone charged with a capital offense?

A. Yes, I was appointed, recently, to represent Mr. James Lockett in Summit County, the case of State of Ohio versus James Lockett.

Q. Now, with respect to your representation of Mr. Lockett -- this is a capital case in the State of Ohio?

A. That is correct.

Q. Okay. Now, were there any Codefendants on that case?

A. Maybe I should give just a little background.

Q. Please do.

A. Mr. James Lockett was one of four individuals charged in a felony murder case which arose in January of 1975 in Akron, Ohio.

THE COURT: Isn't that the case that just came out in the O. Bar?

THE WITNESS: That's correct.

THE COURT: And I think the day after it came out I was talking to you or the day -- I remember you were --

MR. SCHWEICKART: You were talking to me, I believe.

THE COURT: Was it you?

THE WITNESS: I don't think I had any conversation with you.

THE COURT: I know about the case; it's a reported case.

THE WITNESS: There were two cases reported the same day. James' case was reversed. He had been convicted and given -- sentenced to the death penalty. His sister, Sandra's case was affirmed on the same day. She also had been sentenced to death.

Q. (By Mr. Schweickart) Okay. Now, has the case of James Lockett been remanded for new trial?

A. Yes, it has.

Q. Now, recently, and using recently, let's take you back to the events of yesterday, being February 14, 1977, did you have the occasion to engage in any plea bargaining with representatives of the Prosecution for the State of Ohio on this case?

A. Yes, I did. We did have a hearing yesterday morning in Akron. At that time I met Mr. Kirkwood of the Prosecutor's Office in Summit County who informed me that he was the chief trial counsel there. We did have some discussions on possibly resolving the case short of trial; and he did come up with a proposal.

Q. Can you tell the Court what the proposal was?

MR. TODARO: Judge --

THE COURT: I don't see how it's relevant.

MR. SCHWEICKART: Your Honor, that's what I say, if

I had an opportunity to --

THE COURT: Take, offer the answer. I don't see how it's relevant, but answer it for the record.

MR. TODARO: Note my objection.

THE WITNESS: It was suggested that we plead Mr. James Lockett, whose case was remanded, guilty to aggravated murder; that the death specifications would be dropped; and that the Prosecutor's Office would have a request in Sandra's case, it be brought back to the Court through a post-conviction action, have her conviction not reversed, but vacate her conviction and have her also plead guilty to aggravated murder without the specifications, thereby taking her off of death row where she now is.

So, in effect, they offered to have Mr. Lockett plead guilty to murder without specifications; then his sister, whose case had been affirmed by the Ohio Supreme Court, would thus be taken off of death row and have the death penalty removed from her head.

Q. (By Mr. Schweickart) In other words, to use the prosecutorial discretion representing the State of Ohio, the Summit County people, in essence, offered to not to kill James Lockett's sister if he would plead guilty to aggravated murder, is that correct?

A. That was my understanding.

Q. And to your knowledge, was any of this negotiation

subject to judicial approval?

A. Mr. Kirkwood indicated that, when I asked him, inquired into the method by which this would be done, the method by which Sandra's plea would be vacated or Sandra's conviction, he indicated that he had had no trouble with this in the past, that there were different methods by which this could be done.

We did have a brief conversation with the Judge on the case, Judge Barbuto, and he indicated in this case that anything we agreed along this line he would go along with 99 percent of the time.

Q. In other words then, or if I'm correct, Mr. Lazarow, that the State was discussing sparing an individual who had been convicted in the State Court process, had been not found to be any mitigation in the State Court process, was sentenced to death in the State Court process, and had the sentence of death affirmed by the highest court in the State of Ohio, through the vehicle of prosecutorial discretion was offering life to that individual through a plea bargain with a Codefendant; is that fair?

A. Yes, that's basically correct.

MR. SCHWEICKART: Thank you.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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Case No. 77-5787

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JAMES K. WEIND,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO
BRIEF FOR RESPONDENT IN OPPOSITION

---

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INDEX

CITATIONS



STATUTES; MISCELLANEOUS:

STATUTES; MISCHELLANEOUS (cont'd):

IN THE
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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## OPINION BELOW

The opinion befow is reported at State v. Weind 50 Ohio St. 2d 224 (1977), with correction of error occurring at page 241 of that opinion reported at 51 Ohio St. 2d 18 (1977). The opinion is correctly set forth in the appendix to the petition. The correction of error is omitted from the appendix to the petition and is attached hereto as Appendix A.

## JURISDICTION

Jurisdiction is invoked by petitioner pursuant to Title 28 U.S.C, Section 1257(3).

## QUESTIONS PRESENTED FOR REVIEW

1. DOES THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

2. WAS PETITIONER DENIED ANY RIGHT UNDER THE FIFTH, SIXTH, OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT OVERRULED PETITIONER'S PRE-TRIAL MOTION FOR A CONTINUANCE?

3. WAS IT CONSTITUTIONAL ERROR WHEN THE STATE TRIAL COURT JUDGE, WITHOUT REQUEST FROM DEFENSE COUNSEL, FAILED TO SUA SPONTE INSTRUCT THE JURY DURING THE TRIAL TO DISREGARD PRIOR REFERENCES TO A TAPE RECORDING WHEN SUCH RECORDING WAS RULED INADMISSIBLE FOR IMPEACHMENT PURPOSES, AND WHEN DEFENSE COUNSEL DID NOT REQUEST SUCH AN INSTRUCTION WHEN THE JURY WAS CHARGED?

## STATEMENT OF THE CASE

Daniel Miles was employed by a 24-hour retail outlet, Ontario Foods, located at 1780 Morse Road. On the particluar date in question, December 15, 1974, he was in charge of store personnel and had arrived at work at 7:00 a.m. Hermalee Ross was employed at the store and was expected at work at 8:30 a.m.

When she did not arrive, Miles started looking for her. When he could not find her, he contacted the police. Their initial response was that twenty-four (24) hours would have to elapse before reporting a missing person. Shortly thereafter, an elderly couple entered the store with a set of car keys which were thought to belong to Mrs. Ross's Volkswagen.

Miles testified that he then went outside, saw the Volkswagen and blood on a white car parked next to it. On the ground was an earring partially covered with blood. (State's Exhibit 12)

Miles then said the police were contacted a second time.

Walter Lee Brock, who was a meat cutter employed by Ontario, testified that he drove his 1967 white Ford Falcon to work and parked it about 6:45 a.m., December 15. During that morning, after the police arrived, Brock testified that he noted blood on his car, and that he was unaware of it being there previous to his arrival at work.

Lois Berg (employed as a dietician at Riverside Hospital) testified that she arrived at the laundromat entrance adjacent to Ontario's about 7:55 a.m. on December, 15, 1974. When the laundromat opened at 8:00 o'clock, she walked in and began doing her laundry. Shortly thereafter, Miss Berg testified she saw a black man with light complexion walk past the laundromat toward the Ontario Store and then on out to the parking lot. The man was wearing blue jeans, a blue jeans jacket and a print scarf.

She stated that the man went to a car, bluish-green in color; she identified it from a series of photographs police subsequently showed her. (State's Exhibit 18) The man went to the car and entered the passenger side; there was a pause of five to eight minutes before it drove away in an easterly direction on Morse Road.

Between 8:30 and 9:00 on the morning of December, 15, Dorothy Hale testified she was at her home located at 11380 Vans Valley Road, Delaware County. She was in her bedroom making the bed, located at the east side of the home. Approximately 150 yards east of the Hale home, on adjacent property, was an abandoned schoolhouse.

Mrs. Hale stated that at this time, she looked out her window and noticed a car stop in front of the schoolhouse and two people get out.

The two people then looked up and down the road and after looking into the schoolhouse, the pair took a female out of the car and led her to the schoolhouse. She could see movement inside and after about a minute and a half elapsed, the two men walked out and drove off. A short time later she called the police.

Howard Wayne Hale, her son, was in his bedroom on the other side of the house. He testified that his mother called to him and that when he went to her bedroom, he looked out the window and saw two people inside the schoolhouse. He watched them as they left and went to the car at a rapid walk. The car was bluish-green and either a Dodge or a Plymouth.

On December 20, 1974, both Mrs. Hale and Wayne Hale identified the car from a series of photographs given them by authorities. (State's Exhibit 18) Ron Price, a detective assigned to Homicide Division of the Columbus Police, identified the photo in State's Exhibit 18. Price said the car in the photo picked by the Hales and Miss Berg was owned by Kay Osborne.

Phillip Longshore, a deputy employed by the Delaware County Sheriff's Department, testified that he was the first officer at the scene

of the homicide. He testified that Edgel Ross arrived that morning and identified the body of his wife. It was stipulated at trial that the body found at the schoolhouse was that of Hermalee Ross.

Edgel Ross testified that his wife had left their home at 31 North Franklin Street, Hilliard, on the morning of December 15th at about 7:35 a.m. She left in her 1974 red Volkswagen which he identified as the one parked in the Ontario lot through State's Exhibit 3. He said she was expected to be at work at 8:30 a.m.

Robert Boswell testified that in December of 1974, he lived at 2209 Wabash Court, Apartment 111, and knew petitioner who lived in the same apartment complex.

Boswell stated that on the morning of the murder, some time around 10:30 to 11:00 a.m., the petitioner came to his apartment and told Boswell that he had something for him. Petitioner then gave Boswell a box with cotton in which there was a weapon; Boswell identified State's Exhibit 20 (a .25 Raven automatic) as the weapon given to him.

Boswell said that petitioner then left and that he began thinking about the gift. He then telephoned Michael Goins, who was also a neighbor, and told him about the transaction. Goins said he would be right over. When he arrived, Goins told Boswell that the "gun was hot".

Shortly thereafter, petitioner returned to the Boswell apartment and proceeded to relate to Boswell and Goins the killing of Hermalee Ross earlier that morning.

Boswell testified that petitioner told them that at the Ontario parking lot, he and Carl Osborne had abducted Mrs. Ross. During the course of the abduction, petitioner told Boswell that petitioner hit her on the head with a gun when the lady put up a struggle. Boswell stated that this gun was a .380 automatic and he identified State's Exhibit 37 as being the same type of gun. Weind also told Boswell that when he hit the woman, a piece of it broke off.

At the scene of the abduction, Officer Daniel Canada testified

that he collected two peices of metal which he identified as State's Exhibits 12E and 12F and also those photographed in State's Exhibits 13, 14 and 15. Ron Price believed that these two pieces of metal were off the trigger guard of a firearm. He testified that the two were taken to a number of gun stores in a attempt to find a matching firearm. He identified State's Exhibit 37 as the firearm purchased from a gun store in Hilliard as a result of the investigation.

Price said he gave the pieces of metal and the gun to Steve Molnar of the Bureau of Criminal Investigation, who testified that he made a comparison of the broken metal pieces with that of the purchased gun, State's Exhibit 37. It was Molnar's opinion that the "two pieces appear to be consistent with the configuration of the lower portion of the trigger guard [of the purchased weapon.]"

A purse was also found at the scene of the abduction. Edgel Ross testified and identified the purse (State's Exhibit 31) as the one his wife had when she left for work that morning.

Petitioner also told Boswell that he had to kick the lady in the stomach and that she grunted before they finally got her in the car.

Boswell testified that when Weind was telling of the incident, he was wearing a pair of blue jeans, a pair of clogs and a blue bandana. Weind told Boswell that the had just soaked the clogs to remove the blood. Weind also told them that Carl Osborne had shot the lady.

Boswell further related that after petitioner had "explained how he killed the woman", the object was to get rid of the gun. (State's Exhibit 20) Boswell said that he, petitioner, and Goins then drove in petitioner's car to the vicinity of Alum Creek. Boswell said that petitioner parked the car and walked toward the creek. He said he did not actually see petitioner throw the gun into the creek.

Boswell testified that during this conversation with petitioner and Goins, the subject of the second gun arose, namely, the one which petitioner said had two pieces of metal broken off. According to Boswell, Goins told petitioner he wanted some money for the gun.

Petitioner then told Goins he would give him something after the payoff which was coming from Mrs. Osborne and was supposed to be $500.

Ron Price, a detective assigned to the Homicide Division of the Columbus Police Department, testified that he was present on December 19, 1974, when the .25 automatic pistol (State's Exhibit 20) was retrieved by a fireman from the Alum Creek location. Price stated that the gun was in his possession until he presented it to Steve Molnar of the Bureau of Criminal Identification and Investigation.

Molnar testified at trial and included in his testimony was his opinion of .25 caliber bullets found at the scene of the crime and those test fired from the weapon retrieved from Alum Creek. After ballistics tests were run, Molnar stated it was his opinion that the bullets were fired from the .25 automatic, in addition to the bullets from the victim. (State's Exhibit 20)

Molnar additionally expressed his opinion with regard to the shell casings (State's Exhibit 35D) in comparison to casings that were test fired with the .25 automatic. His opinion was that the casings were all fired by the firing pin of the .25 Raven automatic. (State's Exhibit 20)

Debbie Zweydorff and Kay Osborne testified as to the whereabouts of petitioner on the evening of December 14 and that following morning.

Debbie testified that after work, she had gone to the Alberta Osborne residence located at 2395 Clarkston Lane. She worked with Kay at Woolworth's in Eastland and stated that she was going to a party at the Osborne house. Debbie stated that when she arrived there that evening, petitioner was there with Carl Osborne. Carl and petitioner then left in Kay's car which Debbie identified as a 1969 Plymouth Road-runner. (State's Exhibit 24)

Debbie stated that about 2:00 a.m. the next morning, she was getting ready to leave the Osborne household to attend a party elsewhere when Carl and petitioner arrived back in Kay's car. Debbie stated

she then left for the party and returned about 4:30 a.m.

She said when she walked in the house, Mrs. Osborne and Carl were still awake. They had been talking but stopped when they entered. Debbie stated that she then went to Mrs. Osborne's bedroom to go to sleep and that Kay came in later.

Shortly thereafter, Debbie testified that Carl Osborne came in the room and told Kay that he was going to take her car.

About 8:00 a.m. Debbie got up and was still at the Osborne residence at 10:00 a.m. when Carl Osborne and petitioner returned. She said that Carl told Mrs. Osborne to "come out and see this". Debbie stated the three remained outside for about a half-hour cleaning the car. When they returned, they looked for a professional car cleaner in the telephone book.

Kay Osborne testified and confirmed the event just stated including the fact that Carl Osborne came into the room and told Kay he was going to use her car.

She additionally stated that she did not get her car back until the next day, Monday, December 16. She said the car had been cleaned both on the inside and out. It also had new tires although in her opinion the tires which had been on the car were not ready to be replaced. She identified the car as the one photographed in State's Exhibit 24.

On the 26th of December, she stated she left home to live elsewhere because her mother had been threatening her.

Stephen D. Lucas, a mechanic working at the Shell Oil Station on 2191 South Hamilton Road, testified that on December 16, 1974, he serviced a 1969 Plymouth which he identified as the one pictured in State's Exhibit 24. He stated that Mrs. Osborne drove the auto in and that about a half-hour later, Carl Osborne and petitioner came in.

Lucas stated he changed all four tires on the vehicle plus the spare, the latter only after petitioner came up to Lucas and told him the he had sold the fifth tire.

Lucas stated the five tires were placed in the trunk of the Plymouth.

Edge Ross testified as to the relationship he had with Alberta Osbone. He said that he had known her for about five years and that their relationship was "sex". Ross further testified that he owned a home in Red Bush, Kentucky, and that about four to six weeks prior to December 15, he was at this Kentucky location.

Ross stated that while he was there, Mrs. Osborne met him there and that their conversations included the fact that Ross and his wife had decided to move to this Kentucky residenee. Ross said that Mrs. Osborne then said "What happens to me?" and that his response was, "You and Carl are getting married and you're on your own."

Petitioner was indicted on three counts: (a) kidnapping, section 2905.01, Revised Code; (2) aggravated murder with two specifications, kidnapping and for hire; and (3) aggravated murder while committing kidnapping with two specifications, kidnapping and for hire.

Petitioner was tried before a jury and found guilty of all counts and specifications.

A mitigation hearing was held under section 2929.04, Revised Code, and the trial court found that none of the three migitating factors were shown by a preponderance of the evidence and the petitioner was sentenced to death.

The judgment, conviction, and sentence were affirmed by the Franklin County Court of Appeals and the Ohio Supreme Court.

## REASONS FOR DENYING THE WRIT

1. THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT IS CONSISTENT WITH THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH FORBIDS CRUEL AND UNUSUAL PUNISHMENTS, AS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSITUTION.

### Introduction

Respondent, State of Ohio, respectfully submits that the statutory provisions, and procedure, for the imposition of capital punish-

ment in Ohio are consistent with the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution.

As separately discussed below, the death penalty in Ohio, as applicable to premiditated and felony-murder, when specified aggravating circumstances are present and no mitigating circumstances exist, is not so grossly disporportionate to the offense.

Nor is the penalty wantonly and freakishly imposed, in an arbitrary or capricious manner, so as to run afoul of the Eighth Amendment or violate the dictates of Furman v. Georgia 408 U.S. 238 (1972). Specific guidelines, in the name of aggravating and mitigating circumstances, provide the necessary control on discretion, focusing on the offenses and the offender.

As a constitutionally indispensable part of the process of inflicting the death penalty in the state of Ohio the circumstances, character, and record of both the offense and the offender are considered in conformity with this court's decisions last term in Gregg v. Georgia 428 U.S. 153 (1976), Proffitt v. Florida 428 U.S. 242 (1976), Jurek v. Texas 428 U.S. 262 (1976), Woodson v. North Carolina 428 U.S. 280 (1976), and Stanislaus Roberts v. Louisiana 428 U.S. 325 (1976).

Once convicted, a death penalty defendant has an appeal as of right under the Constitution of the State of Ohio to both an intermediate appellate court and the Ohio Supreme Court. The explicit nature of the specifications of aggravating circumstances and mitigating circumstances allows effective judicial review to assure that the penalty is imposed fairly and not arbitrarily.

For these reasons, fully set forth below, the Respondent submits that the framework for the imposition of capital punishment in the State of Ohio is constitutional.

1. The Crime

In the State of Ohio the only crime for which capital punishment

may be imposed is Aggravated Murder (Section 2903.01 O.R.C.). The crime is analogous to what was formerly called First Degree Murder in Ohio (Section 2901.01, 1953 O.R.C.), and other states.

That statute provides:

> "Sec. 2903.01 (A) No person shall purposely, and with prior calculation and design, cause the death of another.
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the revised code."

The relevant culpable mental state of "purposely" is defined in Section 2901.22(A)O.R.C. as follows:

> "Sec. 2901.22 (A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature,"

The death penalty may be imposed only for purposeful, planned murders and for purposeful killings during the course of designated felonies.

Unless the existence of an aggravating circumstance listed in Section 2929.04(A) O.R.C. is alleged in the indictment, the penalty for Aggravated Murder is life imprisonment. See Section 2929.03(A) and 2941.14(B) O.R.C.

2. Aggravating Circumstances

One, or more, of the seven aggravating circumstances listed in Section 2929.04(A) O.R.C. must be alleged in the indictment and proven beyond a reasonable doubt or the death penalty is precluded. See 2941.14(B) O.R.C.

The aggravating circumstances are as follows:

"(1) The offense was the assassination of the President of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or, of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another, committed prior to the offense at bar, or, the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

Two of the aggravating circumstances deal with the status of the victim as a public official or a law enforcement officer. However, the status of the victim alone does not permit imposition of the death penalty, as did the statute considered in Harry Roberts v. Louisiana ___ U.S. ___, 20 U.S.L.W. 3083, 21 Cr. L. 3076 (rendered June 6, 1977).

The remaining five aggravating circumstances consider the nature, status, character, or record of both the offender and the offense committed.

In addition to the verdict as to the substantive offense of aggravated murder, the verdict must include separate findings as to the specification of aggravating circumstances. A guilty verdict for the crime, but not guilty as to the specified aggravating circumstance, results in a life sentence.

3. Procedure after conviction for the crime of aggravated murder and a finding of guilty as to an aggravating circumstance

The Ohio law provides for a bifurcated procedure in capital cases as to guilt and sentence. The jury, or a panel of three judges if right to trial by jury is waived, determines guilt or innocence as to the crime and the specified aggravating circumstances. The presiding Judge at a jury trial, or the three judge panel if jury is waived, determines sentence.

After conviction for the crime and an aggravating circumstance, the court must order a pre-sentence investigation and a psychiatric examination. Contrary to the practice in Gardner v. Florida ___ U.S. ___, 20 Cr. L. 3083, Section 2929.03(D) O.R.C requires that copies of both the pre-sentence and psychiatric report be furnished to the offender or his counsel.

The pre-sentence investigation and report is prepared pursuant to Rule 32.2(B), Ohio Rules of Criminal Procedure, which provides:

> "(B) Report
>
> The report of the presentence investigation shall state the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant."

This report of the history, character, and record of the individual offender along with the circumstances of the particular offense is submitted to the sentencing authority.

A mitigation hearing is held to consider those reports, testimony, other evidence, and arguments on the subject of penalty which should be imposed. The offender may make a statement to the court, which need not be under oath, and such is subject to cross-examination only if the statement is made under oath. See Section 2929.03(D) O.R.C.

The judge, or three judge panel if applicable, then considers all relevant information as it relates to the existence of one or more of the three migitating circumstances set forth in Section 2929.04(B) O.R.C.

If a mitigating circumstance is shown to exist by a preponderance of the evidence the penalty is life imprisonment. If no mitigating circumstance is found to exist by a preponderance the death penalty is imposed. Section 2929.03(E) O.R.C.

4. Mitigating Circumstances

Section 2929.04(B) O.R.C. sets forth the relevant factors to be considered by the sentencing authority and the mitigating circumstances as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence of the evidence:
> (1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

As noted previously, the specified aggravating circumstances are directed to the offense and offender.

The statute as to mitigation likewise directs the attention of the sentencing authority to the nature, circumstances, character, and condition of the offender and the offense.

In State v. Bayless 48 Ohio St. 2d 73, 357 N.E. 2d 1035 (1976), the first case upholding the Ohio death penalty statute, the court noted that this statute on mitigation and the mitigating factors, as with any legislation, may require judicial interpretation and clarification. Bayless, supra, at 86. The court further noted that these mitigating factors were to be strictly construed, in favor of the defendant, to allow the broadest consideration of the mitigating circumstances.

In the subsequent case of State v. Woods 48 Ohio St. 2d 127, 358 N.E. 2d 1059 (1976), the second branch of the syllabus, which is the law of the case, see Cassidy v. Glossip 12 Ohio St. 2d 17, 24, 231 N.E. 2d 64 (1967), set forth the meaning and standard to be utilized when considering duress or coercion as a mitigating circumstance under section 2929.04(B)(2) O.R.C. The court held that this circumstance was to be construed more broadly than the defense of duress, and that this mitigating factor turned on the circumstances of each individual case, including the character of the one sought to be influenced, supra, at 135, and the nature and circumstances of the offense, the history, character and the condition of the offender, so as to temper punishment out of consideration of the individual offender and his crime. Supra at 137, citing Williams, v. New York 337 U.S. 241 (1949).

Likewise, in State v. Black 48 Ohio St. 2d 262, 358 N.E. 2d 551 (1976), in construing the third mitigating factor, the first branch of the syllabus held that the sentencing authority should use the broadest possible latitude in determining the offender's mental state should be considered in light of all the circumstances, including the nature of the crime. Against a claim that the mitigating term was not

specifically defined, or was too narrow, the court stated that broadly defined and however evidenced any mental state or incapacity may be considered in light of all the circumstances. Supra at 268.

In State v. Bell 48 Ohio St. 2d 270, 358 N.E. 2d 556 (1976) in the second branch of the syllabus, the court held that the age of the offender and prior criminal record are relevant factors to be considered in determining the existence of mitigating circumstances under section 2929.04(B)(2) and (3) O.R.C. In the opinion, the court indicated that age was a primary factor in determining the existence of a mental deficiency, both minority and senility being relevant. Supra at 282.

Thus it may be seen that all relevant information is, or may be, presented to the sentencing authority which by statute, and construction of the mitigating circumstances, then determines whether society's best interests are served by exacting the ultimate penalty. This decision is based on the circumstances of the particular offense and particular offender,

This procedure complies with the Eight Amendment and the dictates of this court's decisions last term, with the Ohio procedure closely analagous to the procedure upheld in Profitt, supra, and Jerek, supra.

5. Appellate Review

The court of common pleas, in each of Ohio's eighty-eight counties, is the court with general and subject matter jurisdiction in Aggravated Murder cases for which the death penalty may be imposed.

A court of appeals, with geographical jurisdiction of one or more counties, reviews criminal convictions, judgments, and sentences from the court of common pleas. A defendant upon whom the death penalty has been imposed has an appeal as a matter of right to the court of appeals. Article IV section 3, Ohio Constitution. If a timely notice of appeal is not filed a defendant may seek review as a delayed appeal under Rule 5, Ohio Rules of Appellate Procedure.

A death penalty defendant has an appeal as a matter of right to the Ohio Supreme Court, where the conviction and sentence in a capital case has been affirmed by the Court of Appeals. Article IV, Section 2(B)(2)(a)(ii), Ohio Constitution.

An aggrieved defendant in a capital case, as a matter of right, may have his conviction reviewed by the Court of Appeals and the Ohio Supreme Court.

In State v. Bayless, 48 Ohio St. 2d 73, 357 N.E. 2d 1035 (1976) the Ohio Supreme Court noted its duties and responsibility in reviewing a capital case, supra, at 86:

> "[T]his court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges."

Respondent would note that the explicit guidelines contained in the stautory framework for capital punishment facilitates this type of review.

As was noted in State v. Miller 49 Ohio St. 2d 198, 361 N.E. 2d 419 (1977) at 204:

> "This statewide method of review does serve to insure against the arbitrary and uneven imposition of the death penalty."

Based on the foregoing, Respondent submits that appellate review in the state of Ohio will assure fairness and even imposition of the capital penalty.

6. Conclusion

For each of the foregoing reasons, briefly stated, the Respondent, State of Ohio, respectfully submits that the imposition of capital punishment, and the statutory procedures, do not run afoul of the Eighth Amendment, and the writ should be denied.

2. THE PETITIONER WAS NOT DENIED ANY RIGHT SECURED BY THE FIFTH, SIXTH, OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT DENIED A PRE-TRIAL MOTION FOR A CONTINUANCE.

It is the Respondent's position herein that a request for a continuance is a matter for the trial court's discretion, does not constitute grounds for reversal unless there is a clear abuse of discretion; and where the reason for such request is based upon an alleged inability to adequately prepare a defense an appellate court will review the record to determine if counsel for the defendant performed their duties thoroughly, intelligently and well; and where trial counsel states the defense is ready to proceed when the case is called and performs zealously and competently, a conviction will not be reversed based upon denial of a continuance.

Petitioner herein was arrested on December 24, 1974, and held without bond insofar as it was a capital case. The matter was set for trial on February 18, 1975, cognizant of the duty to bring petitioner to trial within ninety (90) days pursuant to section 2945.71, et. seq., Revised Code.

On January 28, 1975, petitioner requested a continuance of that trial date, the principal reason being the lack of full discovery.

The state filed extensive type-written discovery on February 4, 1975, and petitioner filed a supplemental request for continuance on the next day alleging an inability to adequately prepare for trial.

When the case was called for trial by the court on the assigned date, the court asked defense counsel if he was ready to proceed. Trial counsel stated to the court, "The defense is ready, your Honor."

A request for continuance is within the broad discretion of the trial court and the denial of same will not result in reversal unless there is a clear abuse of discretion or a denial of a constitutional right. State v. Bayless (1976), 48 Ohio St. 2d 73, 101.

The state submits that under the facts herein there was no abuse of discretion by the trial court and a specific constitutional right

is not set forth as having been violated.

In addition, the Ohio Supreme Court looks to the record to determine if a defendant received competent, intelligent, earnest counsel performing thoroughly and well. State v. Price (1973), 34 Ohio St. 2d 43, 47; State v. Bayless (1976), 48 Ohio St. 2d 73, 101.

Herein a review of the record by the court disclosed earnest, competent and intelligent counsel for petitioner.

Finally, the statement to the trial court that the defense was ready to proceed militates against an allegation of inadequately prepared counsel or an abuse of discretion by the trial court.

For such reasons the writ should be denied.

3. IT WAS NOT CONSTITUTIONAL ERROR WHEN THE STATE TRIAL COURT JUDGE, WITHOUT REQUEST FROM DEFENSE COUNSEL, FAILED TO SUA SPONTE INSTRUCT THE JURY DURING THE TRIAL TO DISREGARD PRIOR REFERENCES TO A TAPE RECORDING WHEN SUCH RECORDING WAS RULED INADMISSIBLE FOR IMPEACHMENT PURPOSES, AND WHEN DEFENSE COUNSEL DID NOT REQUEST SUCH AN INSTRUCTION WHEN THE JURY WAS CHARGED.

It is the Respondent's position that where the prosecution cross-examines a witness by laying the foundation for impeachment by prior inconsistent statements and it is elicited that a tape recording exists, but the contents are not disclosed, and the court sustains a defense objection to the admissibility of such tape for impeachment purposes, and defense counsel does not request the trial court to instruct the jury to disregard mention of such tape, such unrequested instruction cannot be raised on appeal as error.

Michael Goins, who was called as a court witness, was cross-examined by the state as to statements made by him which were recorded, and which were inconsistent with portions of his testimony at trial.

The state moved the admission of such tapes to impeach the testimony of Goins relative to the prior inconsistent statements. The defense objected and the trial court sustained that objection. Neither the tape, or a portion thereof, was played for the jury.

At that time, defense counsel did not request the court to instruct

the jury to disregard prior mention of such tapes.

At the end of the trial when the jury was given instructions of law, defense counsel again did not request an instruction to disregard references to such tape recordings. It should be noted that defense counsel did submit proposed instructions in writing, as to other matters.

Apparently, petitioner contends that the failure of the trial court in sua sponte give such instructions was constitutional error.

The state submits that petitioner waived any right to such instruction, at the time his objection was sustained, by failing to request same. Further, such was not plain error.

The lack of such instruction at the close of the case is governed by State Criminal Rule 30, which states that any error in instructions must be objected to or such is waived.

For these reasons the writ should be denied.

## CONCLUSION

For the reasons set forth above the Respondent, State of Ohio, respectfully submits that the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(6) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon James Kura, Public Defender, counsel for petitioner, by mailing same to his office at 400 South Front Street, Columbus, Ohio, 43215, by United States Mail, postage prepaid, this 10th day of January, 1978. I further certify that all parties required to be served have been served.

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